

Kalikow v Shalik

2008 NY Slip Op 32708(U)

September 26, 2008

Surrogate's Court, Nassau County

Docket Number: 340361

Judge: John B. Riordan

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

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EDWARD M. KALIKOW and LAURIE PLATT,

Petitioners,

File No. 340361

-against-

Dec. No. 429

EUGENE SHALIK and JAMES C. DEVITA,
Preliminary Executors of the Estate of
PEARL S. KALIKOW, Deceased,

Respondents.

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Before the court is Petitioners’ motion to confirm an arbitrator’s award and respondents’ cross-motion to vacate the award.

This dispute concerns the construction of a partnership agreement. Petitioners, decedent’s children, allege that the provision in the decedent’s will which bequeathed her interest in the partnership to a charity violated the agreement. Respondents, the preliminary executors (“executors”) contend that the bequest did not violate the agreement.

Following a determination by the court that the provisions of the agreement required that the dispute be resolved by arbitration, the executors moved for an order disqualifying the arbitrator designated in the agreement. The executors alleged that the personal and business relationship between one of the petitioners and the arbitrator required disqualification.

Following a hearing on June 26, 2007, the court determined that the arbitrator should be disqualified based upon his failure to disclose details of his relationship with one of the respondents ([14 Misc 3d 1203[A] [Sur Ct, Nassau County 2006]).

Thereafter, the court granted petitioners’ motion for reargument. Upon reargument, the court vacated the prior decision and directed further disclosure by the arbitrator (15 Misc3d 1106

[A] [Sur Ct, Nassau County 2007]).

The hearing was re-opened and the court's subsequent decision of November 9, 2007 determined that the arbitrator should not be disqualified. The parties were directed to proceed to arbitration. The arbitration hearing was held on April 9, 2008, and an award was issued. The arbitrator concluded that the decedent's bequest violated the partnership agreement.

The executors now seek to vacate the award on the grounds of partiality and misconduct. They allege that the arbitrator is biased and that his bias is indicated by:

(1) dismissal of the stenographer retained by respondents, the arbitrator stating that respondents were required to give three-days notice pursuant to the AAA Rules for Commercial Arbitration which the parties consented would apply; (2) the arbitrator's refusal to testify at the hearing; (3) the arbitrator's refusal to adjourn the hearing to permit the executors' chief counsel to attend and to accommodate the request of the Attorney General for an adjournment; (4) the refusal to permit respondents to refer to James DeVita, a retired Roman Catholic priest, as "Father DeVita"; and (5) the alleged failure of the arbitrator to disclose relevant information concerning transactions on his part which post-date the June 26, 2007 hearing.

Courts are bound by an arbitrator's interpretation of a contract (*TC Contracting, Inc. v 72-02 Northern Blvd. Realty Corp.*, 39 AD3d 762 [2d Dept 2007]) An arbitrator's interpretation is impervious to judicial challenge (*Angelo's Const. Co., Inc. v Triangle Fixture and Refrigeration Co. Inc.*, 145 AD2d 394 [4th Dept 1988]) unless the interpretation violates public policy, is irrational or exceeds a specifically enumerated limitation of the powers of the arbitrator (*Matter of New York State Correctional Officers and Police Benevolent Assn. v State of New York*, 94 NY2d 321 [1999]). An award is irrational if there is no proof to justify it or if the

construction of the provisions in dispute creates a new contract for the parties (*City of Peekskill v Local 456, Intern. Broth. of Teamsters*, 49 AD3d 730 [2d Dept 2008]). The executors do not allege that the construction is irrational. Thus, the grounds for disqualification in this case are partiality and misconduct (CPLR 7511 [b] [1]).

The court previously determined that the relationship between the arbitrator and a petitioner was not sufficient to disqualify the arbitrator. This does not foreclose the executors from alleging that the conduct of the arbitrator at the hearing indicated a bias in favor of petitioners. The court finds that respondents did not establish that the conduct of the arbitrator evidenced a pre-existing bias (*Balis v Chubb Group of Ins. Companies*, 50 AD3d 682, [2d Dept 2008]). The conduct of the arbitrator as herein alleged does not support an inference of bias (*Cardeon v New York Cent. Mut. Fire Ins. Co.*, 17 AD3d 1037 [4th Dept 2005]).

In addition to disqualification for bias, an arbitrator can be disqualified for procedural errors or misconduct which do not necessarily signify bias, but deprives the complaining party of a fair hearing (*Henneberry v ING Capital Advisors, Inc.*, 10 NY3d 278 [2008]).

Respondents allege that they should have been permitted to make a record of the hearing. Given the extended litigation in this dispute, the better course would have been to permit respondents to retain a stenographer. The refusal to permit respondents to employ a stenographer, however, did not deprive respondents of a fair hearing, nor did it affect their ability to seek the instant relief. There is no requirement that a hearing be transcribed, and a motion to vacate an award can be made on the basis of affidavits which were, in fact, submitted to the court (*see Boehme v Traina*, 211 AD2d 784 [2d Dept 1995]).

Respondents allege that it was misconduct for the arbitrator to refuse to be called as a witness. A person who is a material witness in a proceeding cannot serve as an arbitrator in that proceeding (*see Fritz v Fritz*, 186 AD2d 625 [2d Dept 1992]). On the prior motion, respondents did not allege as a basis for disqualification that the arbitrator was a material witness. Respondents should have raised this objection on the prior motion and are precluded from doing so now (CPLR 7511[b][1][iv]).

Respondents contend that the arbitrator should have granted a request for an adjournment because respondents' "chief counsel" was "out of state". Generally, adjournments are within the sound discretion of the arbitrator (*Matter of Omega Contr. v Maropakis Contr.*, 160 AD2d 942 [2d Dept 1990]). However, the refusal to grant an adjournment can be the basis for vacating an award where the refusal constitutes an abuse of discretion (*id.*).

Respondents may have been entitled to an adjournment if an attorney had conflicting engagements (*Whale Securities Co. v Godfrey*, NYLJ 6/24/99, at 30, col 1, *affd* 271 AD2d 226 [1st Dept 2000]). However, the attorney does not state that he had a conflicting engagement. Further, respondents did not establish that the refusal to grant an adjournment prevented them from presenting material and pertinent evidence (*Matter of Ins. Co. of No. Am. v St. Paul Fire and Mar. Ins. Co.*, 215 AD2d 386 [2d Dept 1995]). Additionally, it is noted that the request by the Assistant Attorney General for an adjournment was for the purpose of continuing settlement negotiations and was not based upon her inability to attend the hearing.

Respondents contend that the arbitrator refused to consider material facts and relevant documents. The refusal by an arbitrator to consider material evidence may constitute misconduct sufficient to vacate an award. Here, the proof was insufficient to establish misconduct

(*D'Amato v Lefler*, 290 AD2d 475 [2d Dept 2002]; *Glover Bottled Gas Corp. v Local 282, IBT*, 119 AD2d 727 [2d Dept 1986]). The arbitrator sustained Kalikow's objection to a question regarding the definition of "permitted assigns" in Article 24 of the agreement, but the attorney's affidavit does not state the basis for the objection. The allegation of an error, without a full explanation of the facts, is insufficient to set aside the award.

The issue as to the arbitrator's failure to disclose certain business transactions prior to the first scheduling of a hearing was addressed in the court's prior decisions. Respondents did not establish that the arbitrator failed to disclose subsequent transactions which would be a basis for vacating the award.

The court concludes that respondents failed to establish by clear and convincing evidence that the arbitration award should be vacated.

Accordingly, the motion to confirm the award is granted, and the cross-motion to vacate is denied, with no award of costs.

Settle order.

Dated: September 26, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court