

Miller v Arnold Worldwide, LLC

2008 NY Slip Op 32884(U)

October 16, 2008

Supreme Court, New York County

Docket Number: 603947/05

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 49

Tim Miller

INDEX NO. 603947/05

MOTION DATE _____

- v -

MOTION SEQ. NO. 05

Arnold Worldwide

MOTION CAL. NO. _____

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

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/16/08

Alan Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
TIM MILLER,

Plaintiff,

- against -

ARNOLD WORLDWIDE, LLC.,

Defendant.
-----X

Index No. 603947/05

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Herman Cahn, J.

Motion sequences 005, 006 and 007 are consolidated for disposition.

Plaintiff Tim Miller moves, in motion sequence 005, to vacate the arbitration award issued in a related proceeding. Miller also moves, in motion sequence 007, to compel the Arbitrator to comply with a subpoena for information regarding the existence of an ongoing financial relationship with a hostile witness and to adjudge the Arbitrator in contempt if the Arbitrator does not comply with the court order.

Defendant Arnold Worldwide, LLC (Arnold) moves, in sequence 006, to confirm the arbitration award, CPLR 7510. It further seeks to have the Court sanction Plaintiff and seeks payment for incurred legal fees that are expected to exceed \$10,000.

BACKGROUND

This case arises from a Screen Actors Guild (SAG) contract between Plaintiff, an actor, and Defendant, an advertising agency. On May 12, 2003, the parties entered into a standard form SAG "extra" contract, that incorporated by reference the 2003 SAG Commercials Contract (SAG Contract). Pursuant to the SAG Contract, Miller was hired to perform as an "extra" in a commercial. The SAG Contract defines "extras" as "[p]ersons appearing in the foreground

[* 3]

solely as atmosphere and not otherwise covered by the foregoing” (SAG Contract, § 6(C)). A “principal performer” is defined as “[a]nyone whose face appears silent and is identifiable and whose foreground performance demonstrates or illustrates a product or service or illustrates or reacts to the on or off camera narration or commercial message.” (*Id.*).

Miller filed a claim with SAG based on his contention that his performance in the commercial at issue, rose to the level of “principal performer,” rather than an “extra.” The SAG Commercials Department initially agreed with Miller’s contention and filed a complaint against Arnold on behalf of Miller. SAG subsequently withdrew its complaint because it concluded that it had insufficient contractual basis to pursue the claim.

On November 7, 2005, Miller filed a complaint against Arnold in this Court. He argued that his performance met all criteria of the principal performer definition in the SAG Contract because he was identifiable in the foreground in the commercial and his performance required him to respond to the lead actor by raising his eyebrows. He claimed that therefore he was entitled to compensation as a principal performer rather than as an extra performer. The difference in compensation between the two was not delineated in the parties’ submissions or in the SAG Contract.

The SAG Contract contains an arbitration clause that provides for disputes thereunder to be resolved by an arbitrator mutually chosen by the parties. Arnold, therefore, filed a motion to dismiss and compel arbitration. The Court ordered the action stayed, pending a decision of an arbitrator, and remanded the case to arbitration for a determination of whether Miller’s performance rose to the level of a principal performer. (Decision dated August 28, 2006).

A hearing before the Arbitrator was held on August 15, 2007. Plaintiff argued that his role in the commercial included raising his eyebrows, which was a “reaction” of the type

addressed by SAG's definition of a principal performer. The Arbitrator issued an award dated December 15, 2007 (Arbitration Award). In it she held that Miller's performance did not rise to the level of a principal performer. She noted that the average viewer would not have been able to discern whether Miller was reacting to anything because his eyebrows were raised throughout the brief time he was shown in the commercial.

Miller thereupon moved to vacate the Arbitration Award. He claims the Arbitrator exceeded her power by improperly weighing the evidence and disregarding the significance of his raised eyebrows during the commercial. Further, Miller claims that the Arbitrator was biased towards Arnold throughout the arbitration proceeding, because she had worked on SAG cases previously and was acquainted with a witness who testified against Plaintiff during the proceeding. Finally, he claims that the Arbitrator failed to comply with a subpoena, served on May 18, 2008, which sought information regarding whether an ongoing financial relationship existed between the Arbitrator and SAG.

DISCUSSION

The Arbitration Clause

Plaintiff contends that the Court's determination that the SAG Contract required arbitration, made arbitration compulsory. The scope of judicial review on arbitration awards depends on whether the arbitration is compulsory or non-compulsory. (*See Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]).¹

¹ Compulsory arbitration occurs when the parties involved are obligated to arbitrate because of a statutory mandate. (*Id.*). Courts have a broader judicial review of compulsory arbitration, which must be held in accordance with due process and be supported by adequate evidence. Non-compulsory arbitration occurs when the arbitration is pursuant to a voluntary agreement of the parties. (*Id.*). Courts have a limited scope of judicial review of non-compulsory arbitration, in which the plaintiff must show the existence of fraud, corruption or

Here, the arbitration was non-compulsory because the parties voluntarily entered into the SAG Contract that required arbitration and there was no statutory mandate to arbitrate. Thus, the Court limits its review of the decision only to claims of fraud, corruption or other misconduct engaged in by the Arbitrator, as governed by CPLR 7511.

Courts may vacate an arbitration award if the parties' rights were prejudiced by the arbitrator's misconduct, partiality, exceeding of power or failing to make a final and definite award. (CPLR 7511(b)). "CPLR Article 7511 evidences the intent of the Legislature that once it is clear that a valid agreement to arbitrate has been made and complied with . . . the authority of the arbitrator is plenary." (*Matter of Silverman (Benmore Coats)*, 61 NY2d 299, 307 [1984]). Otherwise, courts would be called upon to examine the merits of the dispute, a task that has been explicitly delegated to the arbitrator by mutual agreement.

The Scope of Authority

Plaintiff argues, *inter alia*, that even if the arbitration was non-compulsory, the arbitration decision should still be vacated because the Arbitrator exceeded her power. He contends that the Arbitrator merely speculated that the average viewer would have no way of knowing if he was reacting to anything, despite his raised eyebrows during the commercial. He argues that she exceeded her power by ignoring the significance of his raised eyebrows, rather than applying the facts to the law.²

other misconduct to vacate the arbitration award.

² Plaintiff also argues that the Arbitrator's finding was irrational, that she lacked understanding of how commercials were made, misconstrued the contractual provision and legal precedent, did not consider SAG's initial assessment where it agreed with Plaintiff and improperly weighed the evidence.

Defendant argues that both sides agreed that the Arbitrator would determine whether Plaintiff's performance rose to the level of principal performer. It contends that the Arbitrator was required to use her own independent judgment, as the ultimate finder of fact in the proceeding. The Arbitrator was acting within her power and Plaintiff's contention to the contrary is nothing more than disagreement and dissatisfaction with the Arbitrator's determination.

The SAG Contract requires that "[a]ll disputes and controversies of every kind and nature whatsoever . . . shall be submitted to arbitration . . ." (SAG Contract, § 57). The Court specifically directed the parties to arbitration for a resolution of the dispute by the process delineated in the parties' contract. (Decision dated August 28, 2006). No provision in the SAG Contract limited the Arbitrator's interpretation of the contract terms. The Arbitrator did not exceed the scope of her authority in making her determination.

Bias

Pursuant to the SAG Contract, the parties selected the Arbitrator from a list maintained by the American Arbitration Association (AAA) of SAG predetermined arbitrators. Before the arbitration began, the Arbitrator disclosed to the parties that she had previously worked on one or two SAG cases concerning pension related matters and that one of her employees was an actor and a SAG member. The parties raised no objections with her serving as arbitrator. Plaintiff now argues that the only way he can effectively learn if the Arbitrator had an ongoing financial relationship with SAG prior to the arbitration hearing is through the subpoena he served on the Arbitrator, which seeks information on the existence of a financial relationship.

Certainly, "the failure of an arbitrator to disclose facts which reasonably may support an inference of bias is grounds to vacate the award under CPLR 7511." (*J.P. Stevens & Co. v Rytex*

Corp., 34 NY2d 123, 125 [1974]; see also *SOMA Partners, LLC v Northwest Biotherapeutics, Inc.*, 41 AD3d 257, 258 [1st Dep't 2007]). However, not every failure to disclose a prior relationship indicates bias. Plaintiff must also show that the relationship is ongoing. (See *Artists & Craftsmen Builders, Ltd. v Schapiro*, 232 AD2d 265, 266 [1st Dep't 1996]). Further, even if the arbitrator had an ongoing relationship with the parties or witness that may create a presumption of bias, as long as the plaintiff was aware of such relationship and voluntarily proceeded with the arbitration, he cannot object to the arbitration award based on partiality. (See *Siegel v Lewis*, 40 NY2d 687, 690 [1976]; *SOMA Partners, LLC*, 41 AD3d at 258).

Plaintiff had actual knowledge and facts sufficient to reasonably prompt him to seek discovery into the Arbitrator's alleged partiality, prior to the commencement of the arbitration hearing. Before the hearing, Plaintiff knew the Arbitrator employed a SAG member and that the Arbitrator had previously worked on one or two SAG cases on pension related matters.

During the hearing, the Arbitrator stated that "until this court determined that an actor had a right to go to arbitration without its union, SAG and [Arnold] believed that they had exclusive power to settle and/or dispose of these claims." Plaintiff admitted that this was "a huge 'red flag' at trial and indicated that the [A]rbitrator wanted to protect SAG." (Pl. Aff., ¶ 24). Additionally, Ray Rodriguez, SAG's Deputy General Counsel, testified against Plaintiff via videoconferencing. When he appeared on the teleconferencing screen, the Arbitrator's response was "oh, hi." She disclosed that she had worked with Rodriguez on several occasions in the past, but no further details were provided. Plaintiff disregarded this and went forward with the arbitration. However, this was sufficient to have prompted further inquiry at that time. Plaintiff, therefore, had the opportunity to raise and address these issues prior to the issuance of the arbitration award and opted not to do so.

Confirmation of the Award

Defendant moves to confirm the arbitration award.

“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 7510). Defendant’s motion to confirm the arbitration award is granted because its application was timely and Plaintiff’s arguments for vacature are unavailing.

Sanctions

Defendant further moves to sanction Plaintiff, arguing that his claims are frivolous, without legal merit and are meant to delay or harass Defendant.

Conduct is frivolous if “(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another” (22 NYCRR 130-1.1(c)(1)-(2)). Although Plaintiff’s arguments are unavailing, it appears Plaintiff argued his claims in good faith. Indeed, even SAG initially determined that he was a principal performer. Sanctions are not warranted.

Accordingly, it is

ORDERED that Plaintiff’s motion to vacate the arbitration award is denied; and it is further

ORDERED that Plaintiff’s motion to compel the Arbitrator to comply with a subpoena is denied; and it is further

ORDERED that Defendant’s motion is granted to the extent of confirming the arbitration award, and is otherwise denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: October 16, 2008

ENTER:



J.S.C.

FILED
OCT 21 2008
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