

Iammatteo v Solow Realty & Development Co., LLC
2008 NY Slip Op 33528(U)
December 15, 2008
Supreme Court, New York County
Docket Number: 113438/2008
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 61

MARIE C. IAMMATTEO,
Petitioner,

-against-

SOLOW REALTY & DEVELOPMENT
CO., LLC,
Respondent.

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OFFICE
INDEX NO. 113438 /08
MOTION DATE Oct. 27, 2008
MOTION SUPP. NO. 001
MOTION ST. NO. 48
MOTION ST. NO.

The following papers, numbered 1 to 2 were read on this petition pursuant to Article 75 of the CPLR to modify an arbitrator's award

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, the petition to modify an arbitrator's award is decided in accordance with the accompanying decision, order and judgment is filed with the County Clerk and notice of entry cannot be served by this same date.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served by this same date. appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: December 15, 2008

[Signature]
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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 61

-----X
MARIE C. IAMMATTEO,

Petitioner,

DECISION AND
ORDER

Index No. 113438/2008

-against-

SOLOW REALTY & DEVELOPMENT CO., LLC,

Respondent.
-----X

O. PETER SHERWOOD, J.:

This proceeding was commenced by petitioner Marie C. Iammateo (“Iammateo” or “petitioner”), by Notice of Petition, dated October 2, 2008, and filed with the Court on October 6, 2008, pursuant to Article 75 of the Civil Practice Law and Rules (“CPLR”) to modify an arbitration award (“the Award”) rendered on July 22, 2008, which, *inter alia*, dismissed her claim for breach of a provision of an employment agreement between petitioner and respondent Solow Realty & Development Co., LLC (“Solow Realty”) (“the Agreement”), dated October 24, 2005, that provided for reimbursement of certain moving expenses associated with petitioner’s move from Florida to New York (motion sequence 001). The arbitration was conducted before Rosemary A. Townley, an arbitrator with the American Arbitration Association (“AAA”). Petitioner claims that the arbitrator committed an error in calculation by failing to award her the sum of \$10,965.36 in unreimbursed direct moving expenses.

In motion sequence 002, Solow Realty moves for an order pursuant to §§ 404, 3211 and 7510: (1) denying the petition to modify the arbitration award; (2) dismissing the petition; and (3) confirming the arbitration award on the ground that since the arbitrator dismissed the petitioner’s claim in its entirety and made no award for damages, there is no miscalculation of damages for which a modification would be appropriate.

The Court has reviewed and considered the following papers: the notice of petition and petition, filed October 6, 2008, the notice of motion, dated October 13, 2008, and respondent’s memorandum of law with exhibits “A” and “B”, the petitioner’s memorandum of law in opposition, and respondent’s reply memorandum of law.

Iammatteo began employment with Solow Realty as its Chief Financial Officer in New York City on or about November 1, 2005. At the time she was hired, petitioner was residing in Florida. In connection with her employment, Iammatteo entered into the Agreement, dated November 30, 2005, which provided in paragraph 5 thereof: "You shall receive reimbursement for reasonable and necessary direct moving expenses regarding your relocation from Florida to the New York metropolitan area." The Agreement further provided that petitioner's employment could be terminated at any time with or without cause and that any disputes arising out of the Agreement would be resolved by arbitration before the AAA. On April 24, 2006, petitioner was terminated by Solow Realty.

Iammatteo commenced an arbitration before the AAA on December 14, 2006, asserting that Solow Realty had breached paragraph 5 of the Agreement by failing to reimburse her the amount of \$139,282.12, representing relocation expenses including brokers' commissions, fees for appraisals, recording and attorneys associated with the sale of her residence in Delray Beach Florida and the purchase of her residence in Bronxville, New York. Petitioner claimed that respondent refused to reimburse her the full amount of claimed relocation expenses, claiming that it was only responsible for \$10,965.36 of such expenses.

A hearing was held on May 12, 2008 before an AAA arbitrator. Solow Realty's former Chief Administrative Officer and petitioner herself testified on the claimant's case. Chief Executive Officer Steve Cherniak testified for respondent. In the award issued July 22, 2008, the arbitrator found that paragraph 5 of the Agreement was clear and unambiguous and that "[t]he plain meaning of the phrase 'direct moving expenses' can only refer to those 'moving expenses' which related to Claimant's relocation" and included costs "that are associated with the physical act of moving; in other words, the packing storing, transporting, etc. of household possessions and related objects". Thus, the relocation costs connected with the sale and purchase of petitioner's residences was not considered to be covered moving expenses. The arbitrator concluded that "Claimant is not entitled to reimbursement of \$139,282.12, given the express and clear terms of the Letter Agreement, as such an amount does not reflect the 'direct' amount of her moving expenses. Accordingly, the breach of contract claim, as well as any other claims raised in this matter, is denied in its entirety."

Petitioner now seeks to modify the award on the ground that the arbitrator committed a "calculation error" by failing to award her the sum of \$10,965.36 in unreimbursed direct moving expenses to which even respondent acknowledges she is entitled. Respondent seeks to have the arbitrator's award confirmed and the petition dismissed for failure to state a cause of action. Respondent argues that the arbitrator awarded no amount in damages so that there is no calculation error.

"Judicial review of an arbitrator's award is extremely limited, and once an issue has been decided by an arbitrator, questions of law and fact are not within the power of the judiciary to review, as they are merged into the award" (*Matter of Goldstein v Preisler*, 24 AD3d 441, 442 [2d Dept. 2005]). Indeed, it has been held that an arbitrator's award must be upheld when the arbitrator "offer[s] even a barely colorable justification for the outcome reached" (*Matter of Andros Cia. Maritima S.A. [Marc Rich & Co., A.G.]*, 579 F. 2d 691 [2d Cir. 1978]). In other words, the reviewing court should not second-guess the fact-findings of the arbitrator (*see, Matter of Liberty Mut. Ins. Co. v Sedgewick of N.Y.*, 43 AD3d 1062 [2d Dept. 2007]).

The grounds for modifying an arbitrator's award are few in number and narrowly applied (*see, Matter of Green v Liberty Mut. Ins. Co.*, 22 AD3d 755 [2d Dept. 2005]; *Matter of Domotor v State Farm Mut. Ins. Co.*, 9 AD3d 367 [2d Dept. 2004]). The statutory grounds are enumerated in CPLR § 7511 (c) which provides that a court shall modify an award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

Whatever, the merits of petitioner's claim to a monetary award in the sum of \$10,965.36 as representing the amount of her direct unreimbursed moving expenses, she has failed to demonstrate the existence of any of the statutory grounds for modifying the arbitrator's award. Petitioner attempts to fit her claim within the "miscalculation of figures" ground for modification. However,

the courts have required that such miscalculation appear on the face of the award. Where, as here, no damages have been awarded, there is no calculation error of the sort that may be remedied upon judicial review (*see. Cupero v Herman*, 50 AD3d 791 [2d Dept. 2008]; *Daly v Lehman Brothers, Inc.*, 252 AD2d 357 [1st Dept. 1998]). Moreover, the determination of the arbitrator has an evidentiary basis and is not totally irrational or arbitrary and capricious.

Based upon the foregoing discussion, it is

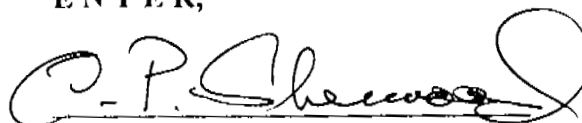
ORDERED, that the petition to vacate the arbitrator's award is denied; and it is further

ORDERED, that respondent's motion to dismiss the petition and confirm the arbitrator's award of July 22, 2008 is granted, the petition is dismissed and the arbitrator's award is confirmed.

This constitutes the decision, order and judgment of the Court.

DATED: 12/15/08

ENTER,



O. PETER SHERWOOD
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be posted hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).