

Conover v Ammoumi
2009 NY Slip Op 31164(U)
May 18, 2009
Supreme Court, New York County
Docket Number: 116823/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. M. ...

PART 11

Index Number : 116823/2008
CONOVER, BRADFORD D.
VS.
AMMOUMI, ABDEL MD
SEQUENCE NUMBER : # 001
CONFIRM ARBITRATION AWARD

Justice

INDEX NO. 116823-08
MOTION DATE 3-5-09
MOTION SEQ. NO. #001
MOTION CAL. NO.

were read on this motion to for Confirmation Arbitration Award

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed Memorandum Decision Order of Judge ...

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

Dated: [Signature]

[Signature] J.S.C.

Check one: [X] FINAL DISPOSITION [] NON-FINAL DISPOSITION

Check if appropriate: [] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: 1AS PART 11

-----X
BRADFORD D. CONOVER, ESQ., D/B/A
CONOVER LAW OFFICES

Index No. 116823/08

Petitioner,
-against-

ABDEL AMMOUMI, M.D.

Respondent.

-----X
JOAN MADDEN, J.:

Petitioner Bradford D. Conover, Esq., D/B/A Conover Law Offices (“Conover”) moves to confirm an arbitration award dated October 28, 2008 (the “Award”) pursuant to CPLR 7510 (motion sequence no. 001). Respondent Abden Ammoumi, M.D. (“Ammoumi”), opposes the petition and separately petitions to vacate the Award pursuant to CPLR 7511 (motion sequence no. 002).¹

Background

The arbitration which is the subject of this proceeding arose out of a dispute over legal fees sought by Conover for his representation of Ammoumi in an action for discrimination and breach of contract against Ammoumi’s former employer, Woodhall Medical Group (“WMG”). By the terms of the retainer agreement, which was signed on October 18, 2005, and revised by letter dated November 1, 2005,² in exchange for Conover’s agreement to represent Ammoumi in his action against WMG, Ammoumi agreed to pay Conover “a sum equal to 3 3-1/3% of any and all sums recovered either as a result of trial or by way of settlement.” The retainer agreement

¹Motion sequence no. 001 and motion sequence no. 002 are consolidated for disposition.

²The original retainer agreement was revised following Ammoumi’s termination from WMG to encompass costs of litigation of Ammoumi’s claims.

also contained an arbitration clause stating, “[i]n the event of any dispute concerning fees, you may have a right to an arbitration under Part 137 of the Rules of the Chief Administrator.”

When he was terminated from WMG on October 28, 2005, Ammoumi was paid severance for the months of November and December 2005 and January 2006. However, the terms of the contract provided for severance pay through June 2006 in the event that Ammoumi was terminated without cause, and thus, the breach of contract claim was for these five months of unpaid severance totaling \$73,750. By letter dated November 21, 2005, Conover wrote to WMG and demanded payment on both the contract and discrimination claims.

The Petition to Confirm Arbitration Award alleges, and the documentary evidence shows, that during the next several months from November 2005 through February 2006, Conover corresponded directly with WMG’s Executive Vice President, Neal Glaser (“Glaser”), as WMG had not retained a lawyer to handle this matter. Conover and Glaser engaged in settlement discussions on both the discrimination and contract claims by letter and telephone, and during the course of these negotiations, Conover kept Ammoumi apprised of the negotiations by email and telephone. Conover informed Ammoumi that he was concerned about a potential settlement of the contract claims since typically such a settlement would require a release of any and all future claims, which he viewed as an unacceptable outcome.

On or about January 31, 2006, Conover advised Ammoumi via email that WMG had now taken the position that Ammoumi was in fact entitled to payment on the remainder of his current contract for the five months pay through June 2006. By letter dated February 23, 2006, Ammoumi received an offer from WMG confirming that he would be paid the remaining five months salary due under the Management Physician Employment Agreement and that “WMG

will not be renewing that agreement at its termination date of 6/26/06.” Ammoumi then sent an email dated February 25, 2006 to Conover asking for his advice as to how to proceed on this offer.

By email dated February 25, 2006, Conover responded and informed Ammoumi that this direct correspondence with him, when he had retained counsel, was improper and Conover would inform WMG of this fact. In addition, Conover stated his opinion that he did not “see a problem with accepting salary/benefits [sic] through 6/26/06, as long as you do not sign or acknowledge any kind of release of any of your claims.” Conover also provided Ammoumi with some case law that supported the proposition that the settlement of the contractual claims would not impact the discrimination claims, and Ammoumi elected to settle the contract claim with WMG and was paid in full all of the monies due to him in the amount of \$73,750.³

During the period from June 2006 through March 2007, Conover continued to represent Ammoumi and was verbally assured by him that he would honor the retainer agreement and pay the agreed upon contingency fee, but only after the discrimination claim was also resolved. During this time period, Conover continued to represent Ammoumi in his discrimination claim and ultimately completed a briefing with the EEOC on the pending claims. By letter dated November 7, 2007, Ammoumi was sent an invoice from Conover stating that a balance of \$24,558.75, representing 33.3% of the amount paid to Ammoumi by WMG, was due as per the retainer agreement.

By letter dated December 12, 2007, Ammoumi responded to the invoice by stating that Conover was “not involved” in the obtaining of the settlement. In addition, Ammoumi alleged

³The monies were paid directly to Ammoumi rather to Conover.

that Conover had violated “the profession’s ethical code of conduct,” and that Conover had severely damaged his discrimination claims. Thus, Ammouni subsequently took the position that no contingency fee was due on monies that he recovered from WMG arising out of the contract. In response, Conover sent Ammouni a letter entitled “Notice of Client’s Right to Arbitrate a Dispute Over Attorney’s Fees” dated January 11, 2008, notifying him of his right to demand an arbitration of the fee dispute pursuant to Part 137 of the Rules of the Chief Administrator of the Courts.

In addition, Conover asserts that he informed Ammouni that his apparent breach of the retainer agreement meant that he would have to withdraw as his counsel. However, Conover completed the briefing of the discrimination claims with the EEOC before withdrawing as counsel.

On February 4, 2008, Ammouni filed a “Client Request for Fee Arbitration” with the Joint Committee on Fee Disputes and Conciliation and paid the filing fee of \$200. In accordance with the Committee’s rule, three neutral arbitrators, two attorneys and one non-attorney, were appointed to hear the arbitration. A hearing lasting several hours was held on October 28, 2008 and both parties, appearing *pro se*, offered testimony and documentary exhibits concerning the facts of the underlying dispute.

On the date of the arbitration, October 28, 2008, the arbitrators handed down their decision in favor of Conover in the amount of \$24,558.75, the full amount which Conover had billed to Ammouni as due under the terms of the retainer agreement. The arbitrators stated reasoning for the award was that, “[t]he attorney effected a partial settlement of the client’s claims and is entitled to the fees stated above in accordance with the retainer agreement.” The

Notice of Arbitration Award, mailed on the same day, stated that “[t]his determination is final and binding on the parties, unless either party rejects the decision of the arbitrator(s) by commencing an action on the merits of the fee dispute (trial de novo) in a court of law within 30 days after the decision of the arbitrator(s) has been mailed.” Neither party appealed within the 30 day time period.

On December 17, 2008, Conover commenced this proceeding to confirm the Award and on December 22, 2008, the notice of petition and petition were served on Ammoumi by service on the doorman at his apartment building and by mailing the notice of petition and petition on December 23, 2008, by first class mail in an envelope marked “personal and confidential.”

Ammoumi opposes the petition to confirm and separately petitions to vacate the Award. Ammoumi first argues that the court lacks personal jurisdiction over him as Conover failed to properly serve the petition and notice of petition on Ammoumi and failed to file a Request for Judicial Intervention (“RJI”).

Ammoumi also argues that the Award should be vacated as Conover is not entitled to compensation for a unilateral payment on his existing contract with WMG that he argues was not a “settlement,” and that Conover did not do an effective job as counsel on his discrimination claims. Ammoumi also argues that the arbitration hearing itself was flawed as “there occurred a number of irregularities in disregard of Part 137.” Specifically, Ammoumi asserts that documentary evidence was not presented five days before the hearing, that the order of the parties’ presentation to the tribunal was improper, and that he was disadvantaged because he was not represented by counsel. Ammoumi further asserts that the Award did not adequately address his arguments made during the arbitration or explain the basis for its conclusion.

Conover counters that to the extent that Ammoumi seeks to revisit the merits of the underlying fee dispute he is precluded from doing so since he failed to commence an action *de novo* within the 30 days proscribed by 22 NYCRR 137.8. Conover also argues that Ammoumi has failed to demonstrate any of the bases for vacating an arbitration award as set out in CPLR § 7511.

Discussion

As a preliminary matter, Ammoumi's arguments that jurisdiction over him was not acquired and that Conover did not timely file an RJI are unavailing. Contrary to Ammoumi's position, the unrefuted affidavit of service submitted by Conover proves that substituted service was made on Ammoumi pursuant to CPLR 308 (2) based on service on the doorman of Ammoumi's apartment building, who is a person of suitable age and discretion, and together with the appropriate follow-up mailing. See Charnin v. Cogan, 250 AD2d 513 (1st Dept 1998); F.I. Du Pont, Glove Forgen & Co. v. Chen, 58 AD2d 789 (1st Dept 1977). In addition, Conover's apparently inadvertent failure to file an RJI before the return date is not a basis for finding lack of personal jurisdiction. Furthermore, any potential defect caused by this failure was cured by Conover serving an Amended Notice of Petition together with an RJI on January 13, 2009.

Next, to the extent Ammoumi seeks to revisit the merits of this case, he was required to commence an action in court within the 30 days of the mailing of the arbitration award as proscribed by 22 NYCRR 137.8, a time period which is absolute and "not subject to judicial discretion." Pruzan v. Levine, 18 Misc.3d 70 (App Term 2d & 11th Jud. Dist. 2007). As Ammoumi did not timely commence a *de novo* action, he is limited to a review of the Award as provided under CPLR 7511.

Under CPLR 7511, an arbitration award may be vacated on the following three grounds: (1) it violates a strong public policy; (2) it is irrational; or (3) it clearly exceeds a specifically enumerated limitation on the arbitrator’s power. Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York, 94 NY2d 321, 326 (1999); Hackett v. Millbank, Tweed, Hadley & McCloy, 86 NY2d 146 (1995). “[J]udicial review of arbitration awards is extremely limited.” Wein & Malkin LLP v. Helmsley Spear, Inc., 6 NY3d 471, 479, cert dismissed, 548 US 940 (2006)(citation omitted). As explained by the First Department:

Judicial authority to vacate an arbitration award is limited. Unless the arbitration agreement provides otherwise, an arbitrator is not bound by principles of substantive law or by rules of evidence but “may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be” and his award will not be vacated “unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power” (Matter of Silverman [Benmor Coats], 61 NY2d 299, 308). A court is bound by an arbitrator’s factual findings, interpretation of the contract and judgment concerning remedies, and “cannot examine the merits of an arbitration award and substitute its judgement for that of the arbitrator simply because it believes its interpretation would be the better one” (Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York, 94 NY2d 321, 326). Even where an arbitrator makes errors of law or fact, a court may not undertake to conform the award “to [its] sense of justice” (Id.). An arbitrator’s award will be confirmed “if any plausible basis exists for the award” (Graniteville Co. v. First Natl. Trading Co., 179 AD2d 467, 469, lv denied 79 NY2d 759, citing Matter of Silverman, supra).”

Azriclant v. Azriclant, 301 AD2d 269, 275 (1st Dept 2002), lv. denied, 99 NY2d 509 (2003).

Under this standard, there is no basis for vacating the Award. First, based on the terms of the retainer agreement and the facts in the record regarding Conover’s efforts on behalf of Ammoumi to settle the contract claims and WMG’s payment to Ammoumi of five months salary it cannot be said that Award was irrational or without a plausible basis. In

addition, any alleged the failure of the arbitrators to give specific reasons for their decision or to address Ammoumi's arguments does not provide a basis for their vacating the Award since an "arbitrator is under no obligation to specifically mention certain issues or to explain the decision." Marfrak Realty Corp. v. Samfred Realty Corp., 140 AD2d 524 (2d Dept 1988). See also, Solow Building Co, LLC v. Morgan Guaranty Trust Company of New York, 6 AD3d 356 (1st Dept), lv denied, 3 NY3d 605 (2004)(noting that since arbitrators are not required to provide reasons for their decision "an award cannot be attacked on the basis of...evidence that the panel refused to consider or failed to appreciated particular evidence or arguments").

Furthermore, the purported procedural irregularities alleged by Ammoumi do not provide a basis for vacating the award. Institute of International Education v. Permanent Mission of Spain to United Nations, 118 AD2d 433 (1st Dept), appeal denied, 68 NY2d 608 (1986) (technical irregularities did not provide a ground for vacating the award). Next, under CPLR 7506 (d) "a party has a right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived." However, this statute only precludes a forced waiver of the right to counsel and Ammoumi elected to appear without counsel and only raises the issue now.⁴ Thus, Ammoumi's decision to appear *pro se* during the arbitration does not provide a ground for vacating the Award. See Book 7B McKinney's CPLR, 7506, Alexander Commentaries, C70506:4.

Accordingly, as there is no basis for vacating the Award, the motion to confirm it

⁴Moreover, Ammoumi's unsubstantiated claim that "he could not find a lawyer who would accept advising him against another lawyer" is insufficient ground for vacating the Award.

must be granted.

Conclusion

In view of the above, it is

ORDERED that the petition to confirm the Award is granted (motion sequence no. 001) and the cross-petition to vacate the Award (motion sequence no. 002) is denied.

Settle order and judgment on notice.

DATED: May 18, 2009


J.S.C.