SHORT FORM ORDER

INDEX # 22122-09
RETURN DATE: **7-29-09**
MOT. SEQ. # **001**

SUPREME COURT - STATE OF NEW YORK
**I.A.S. TERM, PART XXIV - SUFFOLK COUNTY**

**PRESENT:**
**Hon. PETER FOX COHALAN**

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In the Matter of Fee Dispute Arbitration Between

MICHAEL N. KLAR, ESQ.,

Petitioner,

-against-

LEAH WILEN,

Respondent.
----------x

CALENDAR DATE: April 7, 2010
MNEMONIC: MD; C/Disp.

PLTF'S/PET'S ATTORNEY:

Michael N. Klar, Esq. Pro Se
1 Old Country Road
Carle Place, NY 11514

DEFT'S/RESP ATTORNEY:

Upon the following papers numbered 1 to 24 read on this motion to vacate arbitration award ; Notice of Motion/Order to Show Cause and supporting papers 1-18 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 19-24 ; Replying Affidavits and supporting papers ; Other ; and after hearing counsel in support of and opposed to the motion it is,

**ORDERED** that this petition by Michael N. Klar, Esq., an attorney, to vacate and set aside an arbitration award, dated May 20, 2009, pursuant to CPLR § 7511 in this attorney fee dispute matter is denied in its entirety, the arbitration award is confirmed and petitioner shall refund to Leah Wilen, the pro se respondent, the amount of $5310.00 as called for in the arbitration order within thirty (30) of receipt of a copy of this order.

The petitioner (hereinafter Klar) represented the pro se respondent (hereinafter Wilen) in a post judgment matrimonial action against her ex-husband, Darrin Wilen, before my distinguished colleague, Acting Supreme Court Justice Andrew A. Crecca, involving a custody issue. Subsequently, Wilen filed for arbitration of a fee dispute resolution with the Suffolk County (New York) Bar Association, dated February 14, 2009, seeking the return of her legal fees because she believed Klar's actions resulted in the denial of her request to modify and/or reform several provisions of the Stipulation of Settlement, dated August 2, 2006, in the divorce action. An arbitration hearing was held on the fee dispute and the three (3) person arbitration panel [Rudolph H. Cartier, Esq., Steven Kuhn, Esq., and Kathleen Warszycki] in an award, dated May 20, 2009, found that of the original retainer of $20,000.00, Klar was due $14,690.00 and Wilen was due a refund from Klar of $5310.00.

Klar thereafter brought this petition seeking to vacate and set aside the arbitration award pursuant to CPLR §7511 (b) arguing that the arbitration panel exceeded its power, the award was totally irrational, and the award to refund a portion of the retainer involved a "technical violation" in failing to send a billing statement and should not have resulted in the award of a refund of $5310.00. He also claimed that the arbitration panel granted Wilen a refund even though she did not request it. Wilen, pro se, argues in upholding the award and in opposition to Klar that she received no statements from him as of

the date of her request for arbitration which indicated her opposition to the fee and her right to a refund.

For the following reasons, Klar's motion to vacate and set aside an arbitration award, dated May 20, 2009, pursuant to CPLR §7511 is denied in its entirety, the arbitration award is confirmed and Klar shall refund to Wilen the amount of $5310.00 as called for in the arbitration order within thirty (30) of receipt of a copy of this order.

The Court of Appeals in the case of ***Matter of Mamaroneck Avenue Corp. v. 151 East Post Road Corp.***, 78 NY2d 88, 571 NYS2d 686 (1991) emphasized the strong public policy in New York in favor of arbitration:

> "Arbitration is a favored method of dispute resolution in New York, as this Court has repeatedly held...and New York courts interfere `as little as possible with the freedom of consenting parties' to submit disputes to arbitration [cites omitted]. Additionally, the cases grant arbitrators broad authority to resolve disputes, unfettered by formal rules of law or the constraints of the traditional litigation model [cites omitted]. When the original parties to this lease consented to arbitration of a rent dispute, they necessarily entrusted the dispute to the considerable discretion of the arbitrator. Article 75 and the relevant case law together chart the outer limits of this discretion, 78 NY2D at 92."

As a matter of public policy, the merits of an arbitration are beyond judicial review ***Integrated Sales, Inc. v. Maxell Corp. of Am.***, 94 AD2d 221, 224, 463 NYS2d 809, 811 (1st Dept. 1983); ***Matter of Adelstein v. Ortiz Funeral Home, Inc.***, 75 AD2d 529, 530, 426 NYS2d 768, 769 (lst Dept. 1980), aff'd. 52 NY2d 997, 438 NYS2d 80 (1987). In furtherance of the laudable purposes served by permitting consenting parties to submit controversies to arbitration, New York adopted a policy of noninterference, with few exceptions, in this necessary and desirable alternative to litigation for dispute resolution ***Matter of Sprinzen[Nomberg]***, 46 NY2d 623, 629, 415 NYS2d 191 (1984). The applicable principle is that an arbitrator's award will not be vacated unless it is totally irrational, violative of a strong public policy or exceeds a specifically enumerated limitation on his power ***Matter of Albany County Sheriff's Local 775 of Council 82 [County of Albany]***, 63 NY2d 654, 479 NYS2d 513, 514 (1984); ***City of Poughkeepsie v. Civil Service Employees Assn., Inc.***, 104 AD2d 963, 480 NYS2d 757 (2nd Dept. 1984).

A court's review of an arbitration award is strictly limited by CPLR §7511. Errors of fact or law are insufficient to vacate an arbitrator's award. ***Kingsbridge Center of Israel v. Turk***, 98 AD2d 664, 469 NYS2d 732 (1st Dept. 1983). Only if the award is violative of public

policy or wholly irrational may it be vacated. ***Diaz v. Pilgrim State Psychiatric Center***, 62 NY2d 693, 476 NYS2d 525 (1984). The Court is mindful of the Appellate Division, Second Department's most recent pronouncement in ***Matter of Erin Construction & Development Co., Inc. v. Meltzer***, 58 AD3d 729, NYS2d (2nd Dept. 2009)on arbitration awards wherein the Court stated:

> "An arbitration award can be vacated by a court pursuant to CPLR 7511 (b) on only three (3) narrow grounds; if it is clearly violative of a strong public policy, if it is totally or completely irrational, or if it manifestly exceeds a specific enumerated limitation on the arbitrator's power [citations omitted]. Even if the arbitrators misapply substantive rules of law or make an error of fact, unless one of the three narrow grounds applies in the particular case, the award will not be vacated [citations omitted]. *An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be.*" (emphasis added).

In New York Jurisprudence 2nd on *Arbitration and Award* Vol. 5 §115 it specifically notes the rule of law on arbitration awards as follows:

> Such matters as a mistake of law made by the arbitrators in rejecting relevant evidence, rejecting a witness, making *a misconstruction of the law*, deciding a case on what appear to be unjustifiable grounds, or in the admission of hearsay evidence, the misconstruction of the agreement out of which the controversy has arisen, or the *application of an incorrect measure of damages*, are not open for consideration on motions to confirm or reject an award. *A court may not inquire into the nature or sufficiency of evidence which the arbitrator believed to be relevant or essential*. An award cannot be vacated on the basis of newly-discovered evidence. Nor, generally speaking, will an award be vacated on the ground that the damages given therein are excessive or inadequate, or for a failure to give reasons or to set forth calculations to justify the award." (emphasis added).

Finally, the Court of Appeals in one of its most recent pronouncements on this issue involving an arbitrator's findings and award stated in ***Wien & Malkin Llp et al v. Helmsley-Spear Inc.***, 6 NY3d 471, 478, 813 NYS2d 691, 696 (2006) that:

> "It is well settled that judicial review of arbitration awards is extremely limited (see ***Paperworkers v. Misco, Inc.***, 484 US 29, 108 S Ct. 364, 98 L Ed.2d 286 [1987]). An arbitration 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 F2d 691, 704 [2d Cir. 1978]). *Indeed, we have stated time and time again that an arbitrator's award should not be vacated for errors of law or fact committed by the arbitrator* and the courts should not assume the role of overseers to mold the award to conform to their sense of justice *(se **Matter of Sprinzen [Nomberg]***, 46 NY2d 623, 629, 415 NYS2d 974, 389 N.E.2d 456[1976]; ***Matter of New York Correctional Officers & Police Benevolent Assn. v. State of New York***, 94 NY2d 321, 326, 704 NYS2d 910, 726 N.E.2d 462 [1999] ['A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be a better one']." (emphasis added).

In this case Klar acknowledges a technical violation of the rules and claims that because he was in "substantial compliance" with the rules, the arbitration panel's decision is, in some undefined way, against public policy and completely irrational. However, the arbitration panel was called upon to make a decision on a fee dispute resolution between an attorney and his client on legal fees for work performed and made an award of fees to Klar in the amount of $14,690.00 with a refund of $5310.00 out of a $20,000.00 retainer fee. There is nothing against public policy or any irrationality in the award. Klar fails to appreciate the conclusive effect of an arbitration award or the dictates of the Court in ***Matter of Erin Construction & Development Co., Inc. v. Meltzer***, supra, that:

> "An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be."

The arbitration panel ruling is based on the facts and law as determined by the panel and the award both on its facts and the law applied is not contrary to public policy or completely irrational.

Accordingly, Klar's petition pursuant to CPLR §7511 to vacate and set aside the arbitration award, dated May 20, 2009, is denied in its entirety, the arbitration award is confirmed and Klar shall refund to Wilen the amount of $5310.00 as called for in the arbitration order within thirty (30) of receipt of a copy of this order.

The foregoing constitutes the decision of the Court.

Dated: May 13, 2010

J.S.C.