

Matter of Salvation Army v Clark

2010 NY Slip Op 31774(U)

June 29, 2010

Supreme Court, New York County

Docket Number: 118099/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 118099/2009
SALVATION ARMY
vs.
CLARK, JEFFERY
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001 002 003

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

UNFILED JUDGMENT

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

JUN 29 2010

Dated: JUN 29 2010

HON. JUDITH J. GISCHE J.S.C.
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 10**

-----X
In the Matter of the Arbitration of Certain
Controversies between

DECISION/ ORDER
Index No.: 118099/09
Seq. No. 001 002 003

THE SALVATION ARMY,

Petitioner,

-and-

PRESENT:
Hon. Judith J. Gische
J.S.C.

JEFFREY CLARK,

Respondent.

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
Seq #001 Petitioner's n/m (vacate award), exhs	1
Seq #002 Respondent's n/m (dismiss) w/STS affirm, exhs Petitioner's opp w/HRS affirm, exhs Respondent's reply w/STS affirm, exhs	2
Seq #003 Petitioner's OSC (extend time to serve) w/JE affirm, RJS affid, exhs Respondent's opp w/STS affirm, exhs Petitioner's reply w/HRS affirm, exhs	5 6 7

-----X

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear, in person at the Judgment Clerk's Desk (Room 2115).

Upon the foregoing papers, the decision and order of the court is as follows:

The within petition seeks a judgment pursuant to Article 75 of the CPLR vacating and setting aside an arbitration award (Seq. No. 001). Respondent filed a motion to dismiss the petition in lieu of an answer, pursuant to CPLR § 404 (a) (Seq. No. 002).

Petitioner, thereafter, brought an order to show cause to serve respondent by alternate means or, in the alternative, extend its time to serve respondent (Seq. No. 003). The petition, motion to dismiss, and order to show cause are considered collectively by this court and decided in a single decision and order.

Background and Arguments Presented

On September 6, 2006, respondent, Jeffrey Clark, was in a motor vehicle accident. At the time of the accident, he was employed by petitioner and was a passenger in petitioner's truck when it was struck by an unidentified vehicle. On August 26, 2009, following a testimonial hearing, Sheila Patcoff, Esq., an arbitrator for the American Arbitration Association (AAA), awarded respondent \$50,000.00 as damages ("award").

Petitioner contends that the award should be vacated on the grounds that the award was arbitrary, capricious, unsupported by the factual record, and contrary to well-settled law (Seq. No. 001). Specifically, petitioner argues that the arbitrator failed to rule on the issue of whether respondent suffered a serious injury as required under Insurance Law § 5102 (d); did not "mention what the standard of proof was;" and "did not follow the well settled law with respect to the serious injury threshold."

Respondent contends that the petition should be dismissed (Seq. No. 002) because petitioner's application to vacate is barred by the 90-day statute of limitations set forth in CPLR § 7511 (a); the court lacks personal jurisdiction over respondent; and there is evidentiary support and a rational and legal basis for the arbitrator's award.

Petitioner, thereafter, brought an order to show cause (Seq. No. 003), seeking to

serve respondent by alternate means (CPLR § 308 [5]) or, alternatively, extend its time to serve the petition (CPLR § 306-b).

Discussion

Although respondent has raised numerous arguments about why this petition should be denied as untimely, or improperly commenced; even if timely, it would be and hereby is denied for the reasons that follow:

CPLR § 7511 (b) sets forth the narrow grounds upon which an arbitrator's award may be vacated. An award may be vacated by the court only if the petitioner can prove: it was procured by corruption, fraud, or misconduct, the arbitrator was not impartial, the arbitrator exceeded his or her power, or executed it so imperfectly that the award is indefinite or not final. It may also be vacated if there was a complete failure to adhere to required arbitration procedures.

Although in certain extraordinary circumstances, an award may be vacated if the petitioner can prove it is "utterly arbitrary or violative of public policy," this is a difficult burden to meet, and an award will not be vacated by the court merely because the arbitrator may have committed an error of law or fact. Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y.3d 471 (2006). Nor may the court "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one." Matter of New York State Correctional Officers & Polices Benevolent Assn. v State of New York, 94 N.Y.2d 321, 326 (1999).

The court should not assume the role of overseer to mold an award to conform to its sense of justice. In the matter of Sprinzen v. Nomberg, 46 N.Y.2d 623, 629 (1979). Therefore, judicial review of an arbitration award is extremely limited and it must be upheld when the arbitrator has offered "even a barely colorable justification for the outcome reached." Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y.3d at 479, *supra*.

Here, the award is six pages in length, including a detailed analysis of the arbitrator's findings, conclusions, and basis for the award. It includes in-depth discussion regarding over one hour of direct testimony of respondent and of more than a dozen exhibits, submitted by each party. Based upon her findings, the arbitrator rationally and justifiably reached the conclusion that respondent "suffered a medically determined injury . . . which prevented him from engaging in substantially all of his usual and customary activities for at least seven months post accident." Accordingly, the arbitrator awarded respondent \$50,000.00 plus reimbursement of the AAA filing fee.

Although petitioner makes a claim that the award is arbitrary and capricious and unsupported by the factual record, the record makes it clear that there is evidentiary support and the award is rationally based. The court rejects petitioner's arguments with regards to any alleged mistake of fact or law that it claims the arbitrator made in reaching her decision. The question of whether the arbitrator arrived at the correct conclusions is not for the court to decide. "An arbitration award is not reviewable by a court for errors of law or fact." Colleti v. Mesh, 23 A.D.2d 245 (1st Dept. 1965) *aff'd*. 17 N.Y.2d 460.

Consequently, respondent's other arguments that the statute of limitations is expired and that it was not properly served, do not need to be individually addressed.

Even if petitioner's service is found to be timely, or warranted an extension of time by the court, the award itself would still not warrant vacature.

Accordingly, the petition is hereby denied in its entirety (Seq. No. 001) and the arbitrator's award, dated August 26, 2009, which awarded \$50,000.00 plus reimbursement of the AAA filing fee in favor of respondent, Jeffrey Clark, is confirmed. Respondent is entitled to a money judgment against petitioner for the respective amount awarded. Respondent's motion to dismiss the petition (Seq. No. 002) is granted based on the court's finding of a rational and legal basis for the award. Petitioner's order to show cause is denied for the reasons stated above (Seq. No. 003).

Conclusion

In accordance herewith, it is hereby:

ORDERED that the petition is denied in its entirety (Seq. No. 001); and it is further

ORDERED that respondent, Jeffrey Clark's, motion to dismiss the petition (Seq. No. 002) is granted; and it is further

ORDERED AND ADJUDGED that the Clerk of Court shall enter judgment in favor of respondent, Jeffrey Clark, and against petitioner, The Salvation Army, for the total amount set forth in the arbitrator's opinion and award, Fifty Thousand and 0/100 Dollars (50,000.00); and it is further

ORDERED that petitioner's order to show cause (Seq. No. 003) is denied; and it is further

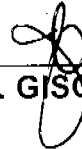
ORDERED that any requested relief not expressly addressed herein has

nonetheless been considered by the court and is hereby expressly denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
June 29, 2010

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1710).