

Cho v Tuan

2011 NY Slip Op 31712(U)

June 21, 2011

Supreme Court, New York County

Docket Number: 111974/10

Judge: Joan A. Madden

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

Dean T. Cho

INDEX NO.

111974/10

Plaintiffs,

MOTION DATE

- v -

MOTION SEQ. NO.

Haw-Hsick Tsau

MOTION CAL. NO.

Defendants.

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 is decided in accordance with the annexed Memorandum Decision + Order,

Dated: June 21, 2011

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: IAS PART 11

-----X
DEAN T. CHO,

Index No. 111974/10

Plaintiff,

-against-

HAN-HSIEN TUAN,

Defendant.
-----X

JOAN MADDEN, J.:

Plaintiff Dean T. Cho ("Cho") moves to confirm an arbitration award dated July 17, 2010 (the "Award") pursuant to CPLR 7510. Defendant Han-Hsien Tuan opposes the request to confirm the award and cross moves to vacate the Award pursuant to CPLR 7511.

The parties entered into a Limited Liability Company Agreement ("the Agreement") establishing the law firm of Tuan & Cho, LLP. When disputes arose between the parties, Cho commenced an arbitration against Tuan pursuant to Article 8.1 of the Agreement which requires that all disputes between the parties arising from or under the Agreement be resolved by arbitration in accordance with the rules of the American Arbitration Association. Cho asserted claims of breach of fiduciary duty, breach of the Agreement, misappropriation of funds and fraud. Tuan answered and counterclaimed for breach of the Agreement and libel and slander. Larry Biblo, Esq. ("Biblo") was appointed the arbitrator. Four days of hearings were held in connection with the arbitration.

After the third hearing date, Biblo informed the parties that his firm was representing a party in a matrimonial action and the firm defending the adverse party in that action was the firm representing Tuan in the arbitration proceeding before him. Biblo assured the parties that

although the case was still being litigated it would not affect his impartiality and after consulting with counsel, Tuan agreed to waive any conflict of interest.

The Award was in Cho's favor and required Tuan to pay Cho \$100,000, plus the administrative costs and the arbitrators fees. Biblo found that "the books and records of Tuan & Cho, LLP were terribly lacking and not kept in conformity with the provisions of the [Agreement]" and that "Tuan was responsible for maintaining the books and records" and that Tuan "did not fully cooperate with the discovery process and that "there were gaps in the T&C books and records could have been filled if Tuan had located certain records." Biblo also found that the evidence showed that Tuan "engaged in suspicious and unethical transactions" with regard to Tuan & Cho, LLP, and that he "showed a disregard for the normal business standards a partner should follow." Based on these findings, Biblo made a negative inference that the missing information would be detrimental to Tuan.

Biblo found that Tuan owed Cho \$100,000 "based on the calculations of the bookkeeper at \$74,595, plus an amount to compensate Cho,." The Award the amount was also based on "(i) the evidence that showed that Tuan withdrew excess distributions from [Tuan & Cho, LLP] after June 30, 2007 in amounts that are impossible to quantify, (ii) the evidence that showed that Tuan paid excess fringe benefits and other personal expenditures from [Tuan & Cho, LLP] after June 30, 2007 in amounts that are impossible to quantify, (iii) the evidence that showed that Tuan was paid an additional \$4,000 per month for a period of time as payments against such excess drawings; (iv) the evidence that showed that the parties eventually established separate capital accounts and (v) the negative inference against Tuan discussed previously." The Award dismissed Tuan's claims for defamation finding that even if the statements at issue were found to

be false, Tuan could not establish damages resulting from such statements.

Cho now moves to confirm the Award. Tuan opposes the motion and argues that it should be vacated on various grounds including, *inter alia*, that (1) Biblo was biased since his law firm's represented of a party in a pending action in which the adverse party was the firm representing Tuan in the arbitration, and that bias is evident from the Award; (2) it was irrational as under the Agreement, both he and Cho were responsible to maintain the books and records of the firm and the adverse inferences against him were unfounded as he did not willfully refuse to obey any discovery orders, (3) Biblo's finding that Tuan engaged in suspicious and unethical transactions was beyond the scope of his authority as it was irrelevant to the claims before the arbitrator, (4) Biblo's decision regarding his counterclaim for libel and slander was irrational as the record showed that Cho statements were false and caused him to lose clients, (5) the Award of \$100,000 was arbitrary and capricious and without a basis in the record and in particular, the calculations and analyses submitted by the parties.

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).

Azrielant v. Azrielant, 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, it cannot be said based on the record before the court that the Award was irrational. The arbitrator’s finding that Tuan was responsible for the books and records of the law firm was, according to the Award, based on “the testimony of bookkeepers, the testimony of the parties, the evidence that showed Tuan was a signatory on the majority of the checks issued by the partnership, the evidence that showed that Tuan prepared the partnership tax returns and the testimony and evidence that showed that Tuan reviewed and maintained control over the general ledger.” Likewise, it appears that there is a plausible basis for the arbitrator’s adverse inference finding and his determination that defamation claim did not result in any damages as there was evidence that Tuan lost the client at issue due to circumstances not related to the statements. Moreover, the award of \$100,000 has a sufficient basis in the record.

Next, as for Tuan’s claim that Biblo was biased, the record shows that he waived this claim. See Atlantic Purchasing, Inc. v. Airport Properties II, LLC, 77 AD3d 824, 825 (2d

Dept 2010). In any event, a party seeking to set aside an arbitration award for alleged bias of an arbitrator must establish his claim by 'clear and convincing proof' And the mere inference of partiality ... is not sufficient to warrant interference with the arbitrator's award" [citation omitted]."). See e.g. Matter of Infosafe Systems, Inc. (International Development Partners, Ltd.), 228 AD2d 272 (1st Dept 1996). Under this standard, Tuan has not met his burden of demonstrating that the Award should be vacated on ground that the arbitrator was biased.


Accordingly, as there is no basis for vacating the Award, the motion to confirm it must be granted.

In view of the above, it is

ORDERED that the motion to confirm the Award is granted, and the cross-motion to vacate the Award is denied.

Settle order and judgment on notice.

DATED: June 7, 2011



J.S.C.