Matter of Cusimano v Strianese Family LP
2011 NY Slip Op 34206(U)
August 9, 2011
Supreme Court, Nassau County
Docket Number: 008522/2010
Judge: Ira B. Warshawsky

[*1]

ORIGINAL

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.
TRIAL/IAS PART 7

In the Matter of the Application of
RITA CUSIMANO,

Petitioner,

For the Judicial Dissolution of The Strianese Family Limited Partnership pursuant to Section 802 of the Revised Limited Partnership Act,

INDEX NO.: 008522/2010
MOTION DATE:
MOTION SEQUENCE: 007, 009 & 010

-against-

THE STRIANESE FAMILY LIMITED PARTNERSHIP and BERNADETTE STRIANESE,

Respondents,

-and-

BERNARD STRIANESE and CARMELA STRIANESE,

Petitioners-Interveners,

-against-

RITA CUSIMANO and BERNADETTE STRIANESE,

Respondents.

The following papers read on this motion:

Petitioners-Interveners' Motion to Confirm Arbitration Award, Heller Affirmation in Support and Exhibits Annexed 1
Petitioners-Interveners' Memorandum of Law in Support 2
Bernadette Strianese Cross-Motion to Vacate Arbitration Award, Teracciano Affirmation in

PRELIMINARY STATEMENT

Petitioners-Interveners Bernard Strianese and Carmela Strianese move to confirm the February 10, 2011 arbitration award rendered by a panel of three arbitrators from the American Arbitration Association Commercial Arbitration Tribunal. Petitioner Rita Cusimano and Respondent Bernadette Strianese cross-move to vacate this arbitration award on the grounds of fraud, the statute of limitations, tax estoppel, and irrationality.

BACKGROUND

This action regards the dissolution of the Strianese Family Limited Partnership (the "FLIP") and the percentage ownership in the FLIP of each of the parties. Rita Cusimano and Bernadette Strianese contend that Bernard and Carmela Strianese ("Mr. Strianese" and "Mrs. Strianese"), parents of Bernadette and Rita, gifted the entirety of their interests in the FLIP through money assignments of the FLIP's equity, such that Rita and Bernadette each own a 50% interest in the FLIP. The Arbitration Panel rendered a unanimous award which found that Rita and Bernadette were gifted only a 4.4527% interest each in the FLIP, with the remaining 91.0946% owned by the Interveners Bernard and Carmela Strianese. (Heller Aff., Exs B & G).

The principal asset of the FLIP, and the basis for the determination of the parties' ownership stake, is a commercial property in Palm Springs, Florida which is leased to a CVS Drug Store, and which the FLIP has owned since February 2000. This Palm Springs property was acquired through a 1031 exchange transaction which swapped this property for the FLIP's

previous commercial property in Deer Park, New York. Rita and Bernadette have contended that they were each gifted a 50% interest in the FLIP through combined yearly gifts of $20,000 by the Interveners which represented equity interests in the FLIP.

The establishment of the FLIP as a holding company for the Deer Park, and then the Palm Springs properties, and the various gift transactions to the Interveners' daughters, were the result of an estate planning arrangement. (Heller Reply Aff., Ex. J). According to the Interveners and their documentary evidence, the Deer Park property was transferred to the FLIP in June of 1998 as part of this estate plan (Heller Reply Aff, Exs. A, B, & F). However, this deed was not recorded, and though Bernadette does not contest this transfer, Rita does. Subsequently in December 1998, Bernard and Carmela Strianese each gifted $10,000 (for a total of $20,000) to each of their daughters Rita and Bernadette. (Terraciano Aff., Ex. A). These gifts represented assignments in equity or partnership interests in the FLIP. Again, this was part of Bernard and Carmela's estate plan to give the entirely of their interests in the FLIP incrementally to their daughters through tax-free gifts. Thus, Bernard and Camerla together gave $20,000 to each of their daughters again in December 1999 and December 2000. (*Id.*) Rita contends that the December 1999 and December 2000 gifts were unnecessary to convey further ownership of the FLIP[1] and Bernadette contends that the gifts continued informally.

In February 2000, the FLIP's Deer Park property was sold and the FLIP acquired a qualifying property in Palm Springs through a tax free "1031 exchange." (Heller Reply Aff., Exs. D, E, F, & H). For reasons not revealed by the record, Bernard and Carmela did not sign any further assignments after the assignments made in December 2000. The record reveals that Bernadette became increasingly involved in the financial affairs of the FLIP and provided the information for the FLIP's tax returns beginning in 2001. The 2001-2009 tax returns for the FLIP, signed by Bernadette in Bernard Strianese's name, according to her testimony, reflect Bernadette's and Rita's purported 50% interests in the FLIP. The FLIP's 1999 tax return, however, which is the year Rita now claims she acquired a 50% interest in the FLIP and Bernard

[1] It is unclear if the partnership assignments after Rita alleges she gained a 50% interest are therefore without value since presumably Bernard and Cermela Strianese no longer held any equity in the FLIP to be able to gift to Rita and Bernadette.

did sign, shows his daughters having a 2.96% interest in the FLIP. (Calica Aff., Ex. H). The 2000 tax return, which was also signed by Bernard, indicates that Rita and Bernadette each had a 4.4526% interest in the FLIP in 2000. (*Id.*, Ex. J).

During the arbitration, Rita Cusimano testified that she received a 50% interest in the FLIP by the 1998 partnership assignment alone, and that the 1999 and 2000 assignments were unnecessary. Now Rita appears to contend through her attorney that she obtained a 50% interest in the FLIP after the 1999 partnership assignment, such that the 2000 partnership assignment was unnecessary. According to her version of the facts, however, it is unclear whether the FLIP ever acquired the Deer Property or the Palm Springs property, since she presented no documentation to further her allegations that the FLIP acquired substantial real estate assets only after she had become a 50% owner, in other words, *after* December 1999.

Rita proffers the FLIP's 1998 tax return in support of her contention that the FLIP only held approximately $10,000 in cash assets when she and her sister Bernadette were each gifted $20,000 in equity or partnership interests in the FLIP. It's not clear how this math adds up to a 50% interest each for Bernadette and Rita. The 1998 tax return appears inconsistent with the numbers provided in the 1999 tax return, which reveals partnership interests "before change or termination" that are different from the end of year partnership interests provided in the 1998 tax return. (Calica Aff., Ex. G). In any case, Rita's theory in this version of the facts appears to be that she had acquired a 50% interest in 1998 and the FLIP acquired the Deer Park property in November 1999. Rita alternatively contends that the FLIP never acquired the Deer Park property, because Bernard Strianese sold the Deer Park property in his name when he performed a 1031 tax-free exchange for the Palm Springs property. (Calica Aff., Ex. F; *but see* Heller Reply Aff., Ex. D). Rita does not explain how the FLIP later may have acquired the Palm Springs property in this version of the facts.

Contrary to Rita, Bernadette contends that the $20,000 yearly gifts continued after the 1998, 1999, and 2000 gifts. However, according to Bernadette, these gifts in partnership interests were made "without the formality of written assignments." (Bernadette mem. p. 9). Alternatively, Bernadette also contends that Mr. and Mrs. Strianese granted the entirety of their partnership interests to Rita and Bernadette through a "phased equity buy-out" in which Mr. and

Mrs. Strianese agreed to exchange incremental interests in the FLIP after 2000, so long as they continued to receive all income from the FLIP (including what was due to Rita and Bernadette from their interests after the 1998-2000 gifts and each incremental exchange thereafter). Bernadette testified during the arbitration that she personally believed that Bernard and Carmela had received sufficient income by 2001 to grant her an additional 45.54731% interest in the FLIP that year. (Bernadette mem. p. 14).

DISCUSSION

In New York, "an arbitration award can be vacated by a court pursuant to CPLR 7511(b) on only three narrow grounds: if it is clearly violative of a strong public policy, if it is completely irrational, or if it manifestly exceeds a specific, enumerated limitation on the arbitrators' power." (*NFB Inv. Svcs. Corp. v. Fitzgerald*, 49 AD3d 747 [2d Dept. 2008]). Further, because "the arbitrator is not bound to abide by, absent a contrary provision in the arbitration agreement, those principles of substantive law or rules of procedure which govern the traditional litigation process," errors of law or fact are insufficient to warrant the vacatur of an award. (*Matter of Sprinzen,* 46 N.Y.2d 623, 629 [1979]). The party moving for vacatur carries the burden of proof. (*Cf. Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 [2d Cir.1997])

Given the courts' policy of non-interference with arbitration as a mode of dispute resolution, and recognizing the freedom that parties have in crafting the rules which will govern them in any arbitrable dispute, a party seeking to vacate an arbitration award has an extraordinary burden in establishing one of the few exceptions that may vacate an arbitration award. Despite the apparent vagueness of "a strong public policy" as a basis for vacatur, courts must not interfere with an arbitrator's determination under the guise of public policy. Quite simply, "an arbitrator is free to apply his own sense of law and equity to the facts as he has found them to be in resolving a controversy" (*Matter of Sprinzen*, 46 NY2d at 631), and courts may only vacate an arbitration award where arbitration is plainly prohibited by a statute or prior case precedent, without engaging in extended analysis to determine whether the law in this area ought be extended. (*Id.*)

Similarly, "irrationality" as a basis for vacating an award is a difficult standard. There must be no conceivable rational basis upon which the arbitrator may have made her determination. (*See Rochester City Sch. Dist. v. Rochester Teachers*, 41 NY2d 578 [1977]; *Brown & Williamson Tobacco Corp v. Chesley*, 7 AD3d 368 [1st Dept. 2004] [holding that "an arbitrator award may not be vacated if there exists any plausible basis for it"). For example, an irrational determination may be a determination for which none of the parties contended and one that is unsupportable by any conceivable rational understanding of the facts. However, because "[a]n arbitrator's paramount responsibility is to reach an equitable result and the courts will not assume the role of overseers to mold the award to conform to their sense of justice" (*Matter of Sprinzen*, 46 NY2d at 629), courts may not interfere with an arbitration award that they believe is wrong if it is nonetheless "barely, colorably justified." (*Yalowitz v. Prudential Equity Gr.*, 25 AD3d 354 [1st Dept. 2006]).

Statute of Limitations, and Incapacity of Carmela Strianese

Rita now contends that the arbitration award must be vacated, because the statute of limitations for contract *claims* prevents the Interveners from *defending* their property interests in the FLIP. According to Rita, Mr. and Mrs. Strianese lost their right to defend their property interests in the FLIP after six years had passed since Bernadette had filled out the FLIP's tax forms reporting her as a 50% owner. At oral argument, counsel for Rita laid out the argument clearly: "The tax return documents, whether he saw it or not, had a K-1 saying his interest and wife's interest went from 4 percent to zero. The statute of limitations accrued with that tax return and K-1 were sent in 2002." (June 20, 2011 Oral Argument Tr. at 31: 3-7). However, Mr. and Mrs. Strianese's interests in the FLIP didn't go from 4% to 0%, but from approximately 45% to 0% according to tax forms filed by Bernadette. Rita's argument has no merit, and in any case, this is an issue that was subject to arbitration under the parties' agreement to arbitrate. The issue therefore cannot be determined by this court, and moreover an error in applying a statute of limitations is not one of the bases for vacating an arbitration award under CPLR § 7511.

Rita further contends that the arbitration award must be vacated because of Carla Strianese's alleged incapacity and failure to request a guardian *ad litem*. It is not clear that failure of a party to *request* the appointment of a guardian *ad litem* would be a violation of the

adverse party's procedural rights in arbitration under CPLR § 7506 or a ground for vacatur under § 7511. In any case, challenges relating to process in the arbitration are waived if there is no objection raised during the proceeding. (*Wise v. Marriott International, Inc.*, 2007 WL 2780395 [SDNY Sept. 24, 2007, J. Preska]). There is no evidence that Rita objected to Mrs. Strianese's participation in the arbitration proceedings without the appointment of a guardian *ad litem*.

Fraud

Rita Cusimano accuses the Interveners of submitting a fraudulent—or perhaps forged—Replacement Deed to the arbitration panel and that this fraudulent submission constitutes a "fraud... in procuring the award" which requires that this court vacate the decision of the arbitrators under CPLR § 7511(b)(1)(i). To support this assertion of fraud, Rita points to only one document among the various documents that were part of the "1031 exchange" by which the FLIP sold the Deer Park property and acquired the Palm Springs property: Rita proffers a Contract of Sale of the Deer Park property which identifies the seller as Bernard Strianese. (Calica Aff., Ex. F). In response, the Interveners have produced the original deed (Heller Reply Aff, Ex. A) which confirms the accuracy of the certified Replacement Deed (*Id.*, Ex. B) that was presented during the arbitration proceeding without objection by any of the parties. Determinatively, the Interveners also proffer the Amendment to the Contract of Sale which corrects the "Seller" to reflect "The Strianese Family Limited Partnership." (*Id.*, Ex. D). Other documents involved in the "1031 exchange" transaction confirm that the transaction involved the FLIP and not Bernard Strianese personally. Rita's fraud accusation is not credible. (*Cf. Goldfinger v. Lisker*, 68 N.Y.2d 225, 231 [1986], *Accessible Development Corp. v. Ocean House Center*, 772 NYS2d 263, 264 [1st Dept. 2004]).

Public Policy of Tax Estoppel

Rita also contends that the arbitration award must be vacated on the ground that "tax estoppel" is a strong public policy and the arbitrators failed to apply it to estop Bernard Strianese from contesting the partnership shares reported in the 2001-2009 tax forms. In fact, there are other grounds for denying the application of tax estoppel, since Bernadette and the FLIP's accountant both confirmed the Interveners' version of the facts, indicating that Bernadette had

signed the FLIP's tax forms from 2001 through 2009 and had provided the information contained in those forms. Also, the arbitrators were entitled to deny tax estoppel on the basis of the 1998 tax return for the FLIP, since that tax return reported 50% partnership shares for each of Bernard and Carmela Strianese. Moreover, the arbitrators could have believed that the partnership shares reported (which did not reflect the December 1998 assignment) or the reported assets (which did not reflect the Deer Park property) reflected errors by the FLIP's accountant that were not known to Bernard or Carmela Strianese, such that tax estoppel should not apply.

As discussed previously, an arbitration award may be vacated only upon a clear public policy that is contained in a statute or has been recognized in well-established decisional law. There is no statute regarding the courts' application of tax estoppel, and neither is there an already established precedent that the application of tax estoppel is not subject to an arbitrator's independent judgment. The Court of Appeals has made it fairly clear that courts should not engage in any detailed analysis or inquiry in order to expand the bases of public policies which prohibit particular determinations by arbitrators. (*Matter of Sprinzen*, 46 NY2d at 631 [holding that "the courts must be able to examine an arbitration agreement or an award on its face, without engaging in extended factfinding or legal analysis, and conclude that public policy precludes its enforcement" before an award may be vacated on public policy grounds]).

Indeed, tax estoppel is not a "public policy" so much as an evidentiary rule applied by courts through their equity powers. A "public policy" in the context of CPLR § 7511 has generally referred to a public prohibition or illegality (such as the regulation of usurious loans) or a particular matter of regulation that is entrusted to the judicial system (such as application of anti-trust laws and award of punitive damages in matters of social concern). (*See Matter of Sprinzen*, 46 NY2d at 630 [citing and discussing *Matter of Publishers' Ass'n of N.Y.C.*, 280 AD 500 (1952), *Matter of Aimcee Wholesale Corp,* 21 NY2d 621 (1968)]).

Tax estoppel is not a "public policy" in this regard and, instead, is analogous to the courts' application in equity of collateral estoppel. The Court of Appeals rejected the contention that failure to apply collateral estoppel, even where it would plainly be applicable, was violative of a strong public policy under CPLR § 7511. Because equity involves various considerations of

fairness, and an arbitrator is entitled to independence in coming to an equitable, just, and practical award, this court will not interfere in the arbitrators' refusal to apply tax estoppel in this case.

Irrationality

Bernadette contends that the arbitrators' award is not supported by the evidence, and it is therefore irrational. As discussed previously, the standard for determining that an arbitrator has made an irrational determination is an extraordinary standard, requiring a movant to establish that "no plausible basis" exists for the arbitrator's understanding of the facts. (*Brown & Williamson Tobacco Corp v. Chesley*, 7 AD3d 368 [1st Dept. 2004]). In this case, the plausible basis for the arbitrators' unanimous award is the version of the facts presented by the Interveners. It is apparent that the arbitration panel found Rita's and Bernadette's contradictory versions of the facts to be not credible. Further, the determinations of the arbitrators are amply supported by the 1999-2000 tax forms and a calculation based upon the December 1998, December 1999, and December 2000 partnership assignments gifted to Rita and Bernadette.

The court grants the Interveners' motion to confirm the arbitration award and the court denies Rita's and Bernadette's motions to vacate.

This constitutes the Decision and Order of the Court.

DATED: August 9, 2011

J.S.C.