Matter of Pos'tive Produce, Inc. v Thermal C/M Servs., Inc.
2011 NY Slip Op 34282(U)
November 10, 2011
Supreme Court, New York County
Docket Number: 102789/11
Judge: Shlomo S. Hagler

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 25

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In the Matter of the Arbitration Between

POS'TIVE PRODUCE, INC., INDEX NO.: 102789/11

Petitioner,

-against-

DECISION/ORDER

THERMAL C/M SERVICES, INC., and
WEBBER/SMITH ASSOCIATES, INC.,

Respondents.

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HON. SHLOMO S. HAGLER, J.S.C.:

Petitioner Pos'tive Produce, Inc. ("PPI" or "petitioner") moves by notice of petition and verified petition to vacate or modify an Interim Award of Arbitrators dated December 7, 2010, and a Final Award of Arbitrators dated March 3, 2011[1] (collectively, the "Award") pursuant to CPLR § 7511. Respondent Thermal C/M Services, Inc., and Webber/Smith Associates, Inc., ("Thermal," "Webber" or collectively, "respondents") oppose the petition and cross-petition to confirm the Award as modified pursuant to CPLR § 7510.

Background

PPI is in the business of treating produce so that it may be approved as suitable for consumption as kosher for religiously observant Jews. (See Notice of Claim, Exhibit "A" to the Cross-Petition.) In or about 2005, PPI sought to construct a new "fresh-cut produce room" of approximately 15,000 square feet within a facility in Savage, Maryland (the "Project"). (See Exhibit

1. Two of three arbitrators executed the Final Award on March 2, 2011 and the third did so on March 3, 2011.

"A" to the Cross-Petition, at ¶10.) Webber submitted to PPI a design/build proposal whereby Webber would design and construct the Project. (Id. at ¶13.) Webber's wholly-owned subsidiary, Thermal, would provide the construction management and general contracting services for the Project. (Id., at ¶14.)

On December 2, 2005, PPI approved the proposal and retained Webber to provide design services for the Project. (See Exhibit "B" to the Cross-Petition.) In or about December, 2005, PPI entered into a contract with Thermal to build and/or construct the Project. (See Exhibit "C" to the Cross-Petition.) The contract at ¶11.1 included a choice of law provision stating that the agreement shall be governed by the law of the place where the Project is located. It also contained a dispute resolution provision at Article 10 providing that all contract disputes shall be subject to and decided by mediation or arbitration.

After Webber prepared the design/construction documents, PPI and the owner of the Maryland facility were unable to finalize an agreement for the Project to proceed in Maryland. (See Exhibit "A" to the Cross-Petition, at ¶45.) As a result, Webber and Thermal located an alternate site for PPI at 1 Cascade Drive, Allentown, Pennsylvania (the "Allentown Site") to construct the Project. (Id. at ¶47.) The parties agreed that new contracts would not be executed and that the original contract(s) would be applied to the Allentown site. (Id. at ¶50.) Webber and Thermal completed the Project for which PPI paid an additional $1,230,160.00 over its original budget for the Project. (Id. at ¶88.)

In or about 2008, PPI demanded arbitration against respondents for claims of breach of contract and fiduciary duty, fraud, and negligent misrepresentation seeking damages of at least $1,230,160.00, together with interest, costs and attorney's fees. (See Exhibit "A" to the Cross-

Petition.) Thereafter, respondents asserted a counterclaim for breach of contract against PPI seeking payment of $474,983.01, together with interest of $199,280.48, plus attorney's fees, costs and penalties due under the Pennsylvania Contractor and Subcontractor Payment Act ("PCSPA"). (See Exhibit "F" to the Cross-Petition.)

The arbitration commenced on May 19, 2009, before a panel of three arbitrators in New York. On December 7, 2010, the arbitrators issued an Interim Award of Arbitrators awarding (1) PPI the sum of $100,000 "due to increased maintenance costs resulting from installed flooring" and (2) respondents the sum of $469,983.15, together with contractual interest of 18% and Pennsylvania statutory penalties (denominated as "interest") equaling $530,823.00, for a sum total of $1,000,806.15. After off-setting PPI's award of $100,000.00, respondents were awarded a net sum of $900,806.15. Respondents were also awarded statutory attorney's fees and expenses to be fixed by the arbitrators in a subsequent award. (See Exhibit "A" to the Petition.) On March 3, 2011, the arbitrators issued their Final Award of Arbitrators awarding respondents the sum of $248,636.91, consisting of reasonable attorney's fees and expenses, expert fees and costs, court reporting fees and travel costs. The arbitrators also provided that PPI reimburse respondents in the sum of $75,668.03 for the American Arbitration Association's ("AAA") administrative fees and expenses. (Id.)

Confirmation of an Arbitration Award

There is a strong public policy in New York State favoring arbitration as an efficacious method of dispute resolution. This policy is especially pronounced in the context of commercial matters as arbitration is routinely relied upon for an expeditious resolution of disputes by arbitrators with practical knowledge of the subject area. (Matter of Goldfinger v Lisker, 68 NY2d

225 [1986].) Courts are reluctant to set aside arbitration awards even when arbitrators err in deciding the law or facts "lest the value of this method of resolving controversies be undermined." (Id. at 230.) The policy favoring arbitration gives rise to judicial deference because "it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded." (Id.) Consistent with this strong public policy, there are few grounds for vacating or modifying arbitration awards and they are narrowly applied.

It is well settled law that courts must confirm an arbitration award pursuant to CPLR § 7510, unless there are grounds to vacate or modify the award pursuant to CPLR § 7511. CPLR § 7511(b)(1) enumerates the following grounds for vacating an award where the parties participated in the arbitration:

(i) corruption, fraud, or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his (her) power or so imperfectly executed it that a final and definite award upon the subject matter was not made; or

(iv) failure to follow the procedure in this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

The grounds for modifying an award are set forth in CPLR § 7511(c) as follows:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

Where a dispute has been arbitrated pursuant to an agreement between the parties, the award may not be set aside unless it violates a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. (Matter of Town of Callicoon [Civil Serv. Empls. Assn., Town of Callicoon Unit], 70 NY2d 907, 909 [1987]; Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, 14 NY3d 119, 124 [2010]).

In this case, PPI contends, inter alia, that the Award should be vacated because of the arbitrators "manifest,disregard"[2] of the law and/or an error in the form of the Award. Specifically, (1) there is an obvious mathematical error in the arbitrators' calculation of interest in the Award, (2) the alleged imposition of the combined 18% contractual interest and 12% statutory "interest" pursuant to the PSCPA is not contemplated by Pennsylvania law and is violative of New York's criminal usury laws,[3] and (3) the imposition of double interest is unconscionable, egregious and is contrary to public policy.

With respect to the first argument, the existence of a computational error on the face of the Award wherein the arbitrators incorrectly added an additional $100,000 in interest is not a ground for vacating the entire Award, but to modify it pursuant to CPLR § 7511(c)(1). The Interim Award of Arbitrators dated December 7, 2010 is hereby modified to reduce the net amount by $100,000.00, from a total of $900,806.15 to $800,806.15, to correct the arbitrators' mathematical error.

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2. The proffered standard of manifest disregard of the law has not been accepted in New York and in the Federal courts as a basis to vacate an arbitration award. (Matter of Raisler Corp., 32 NY2d 274 [1973]; Hall St. Assocs., LLC v Mattel, Inc., 552 US 576 [2008].)

3. New York's criminal usury "loan-sharking" statute prohibits charging interest of 25% or more. (Penal Law § 190.40).

The parties contract at ¶11.1 included a choice of law provision stating that the agreement shall be governed by the law of the place where the Project is located. Even though the Project was initially anticipated to proceed in Maryland, since the Project was ultimately sited in Pennsylvania, the arbitrators correctly applied Pennsylvania law. The arbitrators correctly awarded 18% contractual interest per annum and 12% per annum as a statutory penalty pursuant to PCSPA § 512(a).

PCSPA § 512(a) states, in pertinent part, that:

> If arbitration or litigation is commenced to recover payments due under this act and it is determined that an owner, contractor has failed to comply with payment terms of this act, the arbitrator or court shall award, **in addition to all other damages due,** a penalty equal to 1% per month of the amount that was wrongfully withheld.

The Pennsylvania courts have held that penalties awarded under PCSPA § 512(a) are not construed as interest and are enforceable penalties. (John B. Conomos, Inc., v Sun Co. Inc., 831 A2d 696 [Pa. Super. Ct. 2003]; Eastern Electric Corp. of New Jersey v Shoemaker Construction Co., 657 F Supp 2d 545 [ED Pa. 2009]; Zimmerman v Harrisburg Fudd I, LP, 984 A2d 497 [Pa. Super. Ct. 2009].) Thus, the arbitrators did not award "double interest" of 18% plus an additional 12% interest as PPI contends. Rather, the arbitrators correctly applied the PCSPA and awarded respondents the contractually agreed upon interest of 18% per annum and the PCSPA's statutory imposed penalty of 12% per annum.

Moreover, the arbitrators, as well as this Court, were required to apply Pennsylvania law when considering the rate of permissible interest. The contractually agreed upon 18% interest per year (actually calculated at 1.5% per month) is not usurious under Pennsylvania law.

Pennsylvania's Usury Law, 41 P.S. § 201, applies only to loans of less than $50,000.00, and not to business loans. (Smith v Mitchell, 616 A2d 17 [Pa. Super. Ct. 1992].) Also, the Pennsylvania law permits the parties to a construction contract to specify a higher rate of interest. (Pittsburgh Const. Co. v Griffith, 842 A2d 572 [Pa. Super. Ct. 2003] [the Pennsylvania Court permitted contractually based interest of 18% as the lower statutory interest rate was inapplicable in the context of a construction contractor's claim for breach of contract due to the defendant's failure to pay the last two payments owed under the contract].) Similar to Griffith, in this case the Pennsylvania law permitted these sophisticated parties to negotiate a 1.5% rate of interest per month for default in payment of a multi-million dollar design and construction contract.

Finally, as stated above, the arbitrators did not award "double interest" but correctly applied Pennsylvania law in awarding contractually agreed upon interest and statutory imposed penalties, as well as attorney's fees, costs and expenses for the "substantially prevailing party" pursuant to PCSPA § 512(b). The Award was neither egregious nor contrary to strong public policy, and it does not "shock the conscience." Since there is a strong public policy in favoring arbitration as an efficacious method of dispute resolution, which is especially pronounced in the context of commercial matters between sophisticated parties, this Court will confirm the Award as modified.

Conclusion

Accordingly, IT IS ORDERED AND ADJUDGED, that the petition is granted to the extent of modifying the Award, the cross-petition is granted, and the Award rendered in favor of respondents and against petitioner is confirmed as modified; and

IT IS FURTHER ORDERED AND ADJUDGED, that respondents Thermal C/M Services, Inc. and Webber/Smith Associates, Inc. shall recover from petitioner Pos'tive Produce, Inc., the amount of $800,806.15, plus post-judgment interest at the New York statutory rate of 9% in the amount of $62,998.52, from the date of the Interim Award of Arbitrators of December 7, 2010, and the amount of $324,304.94, plus post-judgment interest at the New York statutory rate of 9% from the date of the Final Award of Arbitrators of March 3, 2011, as computed by the Clerk in the amount of $ 22,470.32, together with costs and disbursements in the amount of $ 245.60, as taxed by the Clerk, for the total amount of $ 1,210,821.94 X and that respondents have execution therefor.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
November 10, 2011

Hon. Shlomo S. Hagler, J.S.C.

Respondents (creditors)
Thermal c/m services, Inc.
and Webber/Smith Associates, Inc.
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Petitioner (debtor)
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Norman Cashman
clerk

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COUNTY CLERK'S OFFICE
NEW YORK