

Matter of Hollow Metal Trust Fund v Elli NY Design Corp.

2012 NY Slip Op 30023(U)

January 4, 2012

Sup Ct, NY County

Docket Number: 109732/11

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 109732/2011

HOLLOW METAL TRUST FUND

vs

ELLI NY DESIGN CORPORATION

Sequence Number : 001

CONFIRM AWARD

INDEX NO. _____

MOTION DATE 9/27/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 25 were read on this motion to/for confirm arbitration award.

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-11

12-19

20-25

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JAN 10 2012

NEW YORK COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 1/5/12

Joan B. Lobis
JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X

In the Matter of the Arbitration between,

THE HOLLOW METAL TRUST FUND and THE
HOLLOW METAL PENSION FUND,

Petitioners,

Index No. 109732/11

-against-

Decision, Order and Judgment

ELLI NY DESIGN CORPORATION,

FILED

Respondent.

JAN 10 2012

-----X

JOAN B. LOBIS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Petitioners, The Hollow Metal Trust Fund and The Hollow Metal Pension Fund

(collectively the "Funds"), bring this special proceeding, pursuant to C.P.L.R. § 7511,¹ seeking an order confirming an interim award issued by Arbitrator Roger E. Maher on July 21, 2011 (the "Interim Award"), which directs respondent Elli NY Design Corporation ("Elli") to provide the Funds with documents necessary to complete an audit of Elli's books and records; directs Elli to pay the arbitrator's fees in the amount of \$1,500.00; and directs Elli to pay the Funds' attorneys' fees in the amount of \$1,500.00. Elli opposes the petition and cross-petitions, under C.P.L.R. §§ 7511(b)(1)(i) and (iii), to vacate the Interim Award in its entirety.

The Funds are entities that receive and collect fringe benefit contributions and provide various fringe benefits to eligible employees on whose behalf employers contribute to the Funds pursuant to collective bargaining agreements. Elli, an employer, entered into a series of

¹ The Court will consider the petition as having been brought under C.P.L.R. § 7510. C.P.L.R. § 2001.

collective bargaining agreements with the United Brotherhood of Carpenters & Joiners of America, Local 2870 and its predecessor, Local 2682 ("the Union"), the most recent of which (annexed to the petition and cross-petition) became effective on or about December 1, 2006 (the "Agreement"). Under the Agreement, Elli agreed to make certain monthly benefits contributions per eligible employee. The Agreement sets forth that disputes arising between the employer and employees shall be "settled jointly in the first instance," then submitted for arbitration before an impartial arbitrator appointed by the New York State Employment Relations Board, whose decision shall be final and binding on all parties. Although the Funds are not parties to the Agreement, they contend, and Elli does not dispute, that they are third-party beneficiaries to the Agreement.

A dispute about the amount of benefits contributions that Elli should have made between January 1, 2005 and September 25, 2009 arose after the Funds audited Elli's financial records. The auditor determined that Elli's benefits contributions were short by \$136,774.97. Elli disputed the auditor's methodology and results. The parties were not able to reach a resolution on the issue of the alleged delinquent benefits contributions. Accordingly, on or about December 6, 2010, the Funds served Elli with a Notice of Intention to Arbitrate ("NITA") the issue of the delinquent benefits contributions before Arbitrator Roger E. Maher.

By notice dated December 22, 2010, Arbitrator Maher scheduled a hearing for January 25, 2011, and the parties appeared on that date. Elli's attorney affirms that he objected to the hearing being conducted "on the basis that the Funds had no right to conduct the arbitration." Elli concedes that the arbitration proceeded and that Elli participated in the arbitration. During the hearing, it became apparent that the auditor had not reviewed certain ledgers and records in preparing

the audit; the Funds contends that this is because Elli refused to turn over certain materials, although Elli contends that it was never informed that the audit was "incomplete." Elli maintained that the auditor had improperly included certain exempt employees (a foreman, office staff, and temporary employees) in calculating the amount of benefits contributions that Elli should have made on behalf of employees covered by the Agreement. Arbitrator Maher adjourned the hearing to allow Elli time to present proof substantiating its claim. Having received no documents, on or about February 11, 2011, the Funds served Elli with a second NITA to arbitrate the issue of Elli submitting to an audit of its books and records.

By notice dated February 21, 2011, Arbitrator Maher scheduled a hearing on the second NITA for April 18, 2011. On or about March 15, 2011, Elli filed an application by order to show cause in the Supreme Court of the State of New York, Queens County, seeking an order staying the arbitration on the grounds that: (i) the demand to arbitrate was premature, as the Agreement requires the parties to attempt to jointly settle the dispute prior to arbitration; and (ii) the Funds' request to review Elli's general ledger was overbroad and beyond the scope of the audit's objective to confirm delinquent contributions to the Funds. On or about March 28, 2011, the Funds filed a notice to remove the action to the United States District Court for the Eastern District of New York. The Eastern District court declined to stay the arbitration.

The parties appeared for the April 18, 2011 hearing, during which they agreed on terms for continuing the audit. Elli agreed to produce its general ledger, cash disbursement journal, copies of checks, and bank statements. The audit was scheduled for May 11, 2011, and was adjourned once to June 8, 2011. On that date, the auditor requested certain other documents that Elli

asserts it had not previously agreed to make available. The requested documents concerned cash disbursements made by Elli to various subcontractors, and particularly to a company known as Tuff Construction, which Elli contends performed consulting work for it. Elli informed the auditor that the documents were not available and the auditor cancelled the audit.

By letter dated July 12, 2011, copied to Elli's attorney, the Funds requested that Arbitrator Maher issue an interim award: (i) compelling Elli to fully cooperate with the Funds' auditors and provide any and all information requested by the auditors for purposes of completing the audit; (ii) retaining jurisdiction for purposes of enforcing the interim decision and issuing a final decision as to the amount due and owing once auditing is complete; and (iii) awarding attorneys' fees and costs expended by the Funds. Having received no response from Elli, on July 21, 2011, Arbitrator Maher granted the Funds' request and issued the Interim Award, which directs Elli to provide specific books and records for the audit and directs Elli to pay the Funds' attorneys' fees and the Arbitrator's fees totaling three thousand dollars (\$3,000).

The Funds now seek an order confirming the Interim Award. In response, Elli cross-petitions to vacate the award, pursuant to C.P.L.R. §§ 7511(b)(1)(i) and (iii), on the grounds that: (i) the arbitrator committed misconduct by rendering an award based on an ex parte communication, denying Elli an opportunity to respond, and as such, not issuing an award without sufficient evidence in contravention of C.P.L.R. § 7506(c); (ii) the arbitrator exceeded his power in issuing the Interim Award, because the award is not based on the relevant bargaining agreement, and as such, is irrational on its face; (iii) the Interim Award violates a strong public policy, by ignoring the parties' bargaining agreement and replacing it with different terms; and (iv) the Interim Award is not a final

and definite award upon the subject matter submitted, because the award leaves open for further determination by the arbitrator whether the audit calculations are correct. Elli further argues that the petition to confirm the Interim Award should be denied on the grounds that it is premature, in that neither a motion to modify nor a motion to vacate has been filed or decided, and alleges that these are conditions required under C.P.L.R. § 7511 before filing a petition to confirm.

It is well settled that judicial review of arbitration awards is limited and that arbitrators' determinations are given "substantial deference." Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y.3d 471, 475 (2006). There is a strong public policy in favor of arbitration and against judicial interference with arbitration awards. Smith Barney Shearson, Inc. v. Sacharow, 91 N.Y.2d 39, 49–50 (1997). C.P.L.R. §§ 7510 and 7511 provide the only statutory authority for judicial review of arbitration awards. Under C.P.L.R. § 7510, the court shall confirm an arbitration award "upon application of a party made within one year after its delivery to him, unless the award is vacated or modified on a ground specified in [C.P.L.R. § 7511]." Under C.P.L.R. §§ 7511(b)(1)(i) and (iii), the court shall vacate an arbitration award if it finds that "the rights of [a] party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or [. . .] (iii) an arbitrator [. . .] exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter was not made." However, in order for this court to intervene in any arbitration proceeding, "there must be an 'award' within the meaning of the statute." Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd., 43 N.Y.2d 276, 281 (1980). The court shall only review final determinations made at the conclusion of an arbitration proceeding upon the matter submitted. Id.

Here, the controversy submitted by the parties to the arbitrator regarded the delinquent funds contributions. The essence of that dispute is whether the auditor was justified in including certain employees while determining the amount of benefits contributions due to the Funds. The Interim Award does not resolve this dispute. Further, neither the Funds, by specifically requesting an interim award, nor the arbitrator, by labeling the award "interim," intended for the Interim Award to resolve the underlying dispute. Elli does not deny that it is a signatory to the Agreement, which compels it to fully cooperate with audits, neither does Elli dispute that it consented to submit certain documents necessary for the audit during both of the January 25, 2011 and April 18, 2011 hearings. As such, the Interim Award does not purport to be final, but rather is intended to eliminate an ancillary issue to the underlying claim submitted to arbitration. At this stage, there is no final determination and the matter is not ripe for judicial intervention under C.P.L.R. § 7510 or C.P.L.R. § 7511. Cf. Civil Serv. Employees Ass'n v. County of Nassau, 305 A.D.2d 498 (2d Dep't 2003). Thus, the court shall neither confirm nor vacate the Interim Award and the matter is dismissed. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition and cross-petition are denied and the proceeding is dismissed in its entirety.

Dated: Jan. 4, 2012

FILED

JAN 10 2012

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JOAN B. LOBIS, J.S.C.