

Matter of Del Vecchio & Recine, LLP. v Udell
2012 NY Slip Op 31355(U)
May 8, 2012
Supreme Court, Nassau County
Docket Number: 17845-11
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

TRIAL PART: 10

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In the Matter of the Fee Arbitration Proceeding
Pursuant to Part 137 of the Rules of the Chief
Administrator of the Courts Between,

NASSAU COUNTY

DEL VECCHIO & RECINE, LLP.

Petitioner,

INDEX NO:17845-11

-and-

MOTION SEQ NO.:1

VESNA UDELL,

Respondent.

SUBMIT DATE:03/07/12

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The following papers having been read on this motion:

Notice of Petition.....1
Opposition.....2

Motion by petitioner, Del Vecchio & Recine, LLP ("Del Vecchio"), for an Order of this Court, pursuant to CPLR §7510, confirming the determination of the arbitrators, directing that judgment be entered thereon, and awarding costs and disbursements, is granted.

Motion by petitioner, Vesna Udell, for an Order of this Court, vacating the arbitration award granted to Del Vecchio & Recine, and awarding legal fees to her in the amount of \$5,000 is denied.¹

The instant petitions arise from an underlying fee dispute between the attorney law firm and its former client. The matter was heard before a panel of arbitrators, and the law firm was awarded the amount of \$45,532.33 against the client.

FACTS

The parties entered into a Retainer Agreement, dated January 9, 2008, where Udell retained Del Vecchio for purposes of negotiating a settlement agreement ("Stipulation") with her spouse. She

¹It is noted that Vesna Udell had filed her February 22, 2012 petition under a separate index number, although the same could have been filed as a cross motion opposing Del Vecchio & Recine, LLP's motion, filed on December 22, 2011.

paid a retainer of \$15,000. The agreement provided that in the event of a fee dispute, such dispute would be resolved through the Fee Dispute Resolution Program (“FDRP”), under 22 NYCRR § 137.0, and “resort to FDRP shall constitute final and binding arbitration”. Further, under the Retainer Agreement, both parties waived their rights to a trial, *de novo*.

According to the defendants, Udell exhausted the initial retainer by January, 2009. As she failed to make further payments, Del Vecchio, moved this Court for interim legal fees, which were awarded to Udell from her spouse, Blaine Udell, in the amount of \$10,000. Notwithstanding Udell’s indebtedness, the law firm continued to represent her in what was described as a “contentious” matrimonial matter. The firm, in addition to dealing with Udell, was subjected to harassing and threatening conduct by her spouse and his attorneys. Del Vecchio, at the time of its request for arbitration, claimed it was owed legal fees from Udell in the amount of \$51,185.22.

Udell takes specific issue with ARTICLE VIII of the Stipulation, ¶2 (c), which provides in relevant part, “...the total sum of \$45,000 [is] to be paid to the Wife’s attorney on behalf of Wife...” (see Petition, Vesna Udell, Exhibit B). As such, her former spouse, Blaine Udell, was obligated to tender the sum of \$45,000 to Del Vecchio. She claims that she has paid the firm an additional \$5,000 while her former husband tendered the sum of \$32,500. According to Udell, Blaine Udell owes the firm a balance of \$12,500, which he attempted to pay and the law firm refused to accept.

Further, she insisted to the firm that a clause be included in the stipulation providing that upon payment of \$45,000 in legal fees, the firm would waive any future claim against her for further fees. However, because she is a “layman”, she did not understand that such language could not be included as Del Vecchio was not a party to the Stipulation between she and her former husband. Udell contends that, at best, the firm is owed \$12,500.

Del Vecchio filed for resolution through FDRP and the matter was heard on December 15, 2011. The ensuing award set forth the amount as due and owing to Del Vecchio from Udell, at \$45,532.33. The law firm then filed the instant motion seeking confirmation of the award and a judgment against Udell. Udell later filed a petition seeking a vacatur of the arbitrator’s award. Upon a motion from Del Vecchio, the both petitions were consolidated.

ARGUMENTS

Implicit in Udell’s argument is that arbitrators’ decision was not proper as they did not allow

Blaine Udell to testify in the proceedings. His testimony would have confirmed that Vesna Udell's counsel and principal of law firm, Phylis Recine, agreed that the \$45,000 referenced in the Stipulation, would satisfy her indebtedness to the firm, in full. Notwithstanding, the foregoing, Udell consistently complained to the firm about being over billed.

Del Vecchio argues that an arbitration award can only be vacated under certain circumstances. Udell has failed to provide any evidence to support that such circumstances existed. Further, it was not improper to exclude the appearance of Blaine Udell as such testimony was already offered by Vesna Udell. Del Vecchio, in addition the pleadings, annexes copies of its billing statements as supporting evidence.

DISCUSSION

Under the state attorney fee dispute resolution procedure, a *de novo* review, by its very nature, is not a review of an arbitration proceeding itself or an arbitration award but a review of the underlying dispute, as if an arbitration proceeding never occurred, thus contemplating a full adjudication, on the merits, of the parties' claims (see 22 NYCRR, § 137.0; see *Sachs v. Zito* 28 Misc3d 567 [NY.Sup Ct 2010]).

Under the FDRP, the submission of a fee dispute to mandatory arbitration does not bar judicial *de novo* review *unless the parties expressly waive their rights to such review in advance.* (see 22 NYCRR §§ 137.2(a),(c).). Further, under 22 NYCRR § 137.2 (c), any agreement by the parties to waive their rights to *de novo* review must be made "in writing in a form prescribed by the Board of Governors." The written waiver form prescribed by the Board of Governors requires both parties to acknowledge that: they agree to be bound by the decision of the arbitrator(s) and agree to waive their rights to reject the arbitrator(s) award by commencing an action on the merits (trial *de novo*) in a court of law within 30 days after the arbitrator(s) decision has been mailed.... Attorney and Client understand that they are not required to agree to waive their right to seek a trial *de novo* under Part 137 (see, *Borgus v. Marianetti*, 7 Misc3d 1003(A), [NY City Ct. 2005]).

Here, the Retainer Agreement contains the proper waiver language and although the relief sought by Udell is limited to the provisions under CPLR §7511, she implicitly is seeking a review of the merits of the fee dispute. She, in her papers, discusses the representations allegedly made by Del Vecchio, her complaints of over billing by the firm, and even allegations of the mishandling of

her case by the law firm. These issues are proper under a *de novo* review, which she voluntarily waived. What remains is the grounds for vacating the judgment due to the actions of the arbitrators.

CPLR §7511(b) sets forth the grounds for vacating an arbitration's award:

“...if the court finds that the rights of that party were prejudiced by: (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 power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection...”.

A party seeking to vacate or modify an arbitration award and a judgment entered thereon has the burden of demonstrating the existence of specified statutory grounds by clear and convincing evidence. Here, the issue as set forth by Udell, alleges that the arbitrators' refusal to allow Blaine Udell to testify constituted misconduct which ultimately prejudiced her. The uncontroverted evidence indicates that she raised the issue during the hearing and one arbitrator inquired as to the subject of Blaine Udell's testimony. As Udell indicated that Blaine Udell would be providing essentially the same testimony regarding attorney, Phylis Recine, the panel determined that such evidence was not essential to matter.

Unless the arbitrator's determination is thus rendered totally irrational, a refusal or failure to pass upon an arguably relevant issue or piece of evidence, even if mistaken, is a matter of arbitral judgment which, being part and parcel of the arbitrator's determination, is not judicially reviewable (see *Maross Const., Inc. v. Central New York Regional Transp. Authority*, 66 NY2d 341 [1985]). Further, the failure of the arbitrator to consider all issues of fact and law which a court would have to consider in order to properly dispose of the same controversy amounts, at most, to mere error and is not judicially reviewable (see *Scott v. Bridge Chrysler Plymouth, Inc.* 214 AD2d 675, [2nd Dept 1995]).

Based on the evidence submitted herein, the court finds that Vesna Udell did not present any evidence that would warrant relief under CPLR § 7511. Accordingly, her petition is denied, Del

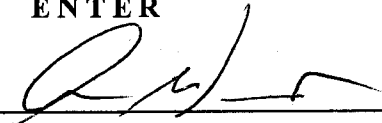
Vecchio's petition is granted.

The arbitrators' award is confirmed and judgment is granted to Del Vecchio against Udell Vesna in the amount of \$45,533.32. Settle Order. Submit Judgement on Notice.

This constitutes the decision and order of this Court.

DATED: May 8, 2012

ENTER



HON. ARTHUR M. DIAMOND

J. S.C.

To:

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ENTERED

MAY 10 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**