Flintlock Constr. Servs., LLC v Weiss
2015 NY Slip Op 30545(U)
April 10, 2015
Supreme Court, New York County
Docket Number: 156278/12
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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FLINTLOCK CONSTRUCTION SERVICES LLC, BASQUE CONSTRUCTION SERVICES, LLC, ANDREW WEISS, and STEPHEN A. WEISS, JR. (a/k/a CHIP WEISS),

Petitioners,

-against-

GRETCHEN WEISS,

Respondent.

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DECISION AND ORDER

Index No. 156278/12

HON. ANIL C. SINGH, J.:

Respondent Gretchen Weiss moves pursuant to CPLR Article 75 for an order: 1) confirming and awarding judgment on the final arbitration award dated November 14, 2014, which incorporates the partial final award dated March 14, 2014; 2) awarding pre-judgment and post-judgment interest; and 3) awarding the costs and attorneys' fees incurred in connection with the instant motion. Petitioners oppose the motion and cross-move to vacate the final award dated November 14, 2014.

Respondent Gretchen Weiss commenced arbitration against petitioners Flintlock Construction Services, LLC ("Flintlock"), Basque Construction, LLC ("Basque"), and its managing members, Andrew Weiss and Stephen A. Weiss, Jr.,

contending that she is a 25% owner of the companies and that the Weisses, who are her stepsons, breached the parties' agreements.

Ms. Weiss contended that the Weiss brothers cheated her of the benefits of membership in the companies and refused to honor the terms of the governing operating agreement. She asserted that her stepsons declined to treat her as an owner of the companies, withheld critical information, and denied her the cash distributions and other benefits to which she was entitled. She asserted further that the Weiss brothers improperly diverted the company benefits due Ms. Weiss to themselves and fraudulently concealed their misdeeds.

In the arbitration, Ms. Weiss sought to: 1) recover her share of the distributions that petitioners had paid to the Weiss brothers; 2) receive the entirety of the guaranteed payments owed to her; 3) enforce her 25% interest in Flintlock and Basque; 4) be allocated her share of tax losses with respect to Flintlock and Basque; 5) receive information she requested; 6) receive health care benefits promised to her; 7) recover punitive damages for breaches of fiduciary duties; and 8) receive an accounting.

A Partial Final Award of Arbitrators was issued by the panel on March 14, 2014. The panel ruled that respondent was not entitled to profits from Flintlock or Basque. However, the panel found that petitioners intentionally and in bad faith

withheld funds owed to respondent, and as of the date of the Partial Final Award still owed her a total of $125,320.23. In addition, the panel respondent was entitled to an accounting to determine whether funds from Flintlock and Basque were improperly used to acquire interests for the Weiss brothers in other companies they had created. Finally, the panel found that respondent was entitled to declaratory relief to the extent of declaring that:

> a) the Weiss brothers breached their duties and obligations under the parties' agreements, including the implied covenant of good faith and fair dealing;
>
> b) the Weiss brothers materially breached their fiduciary duties to respondent;
>
> c) respondent was entitled to be timely provided with all financial statements and tax returns pertaining to the financial performance of Flintlock, Basque, and an additional entity; and
>
> d) respondent was entitled to all future payments provided for pursuant to paragraph 8 of the letter agreement.

The Partial Final Award was in full settlement of all claims and counterclaims submitted to the arbitration, except for legal fees and costs and any claims resulting from the accounting.

On June 18, 2014, the panel suspended proceedings as a result of the non-payment of arbitrator compensation and administrative fees.

On October 7, 2014, the AAA re-opened the proceedings following

respondent's payment of all parties shares of amounts past due to the AAA. The panel then requested information from the parties regarding their submissions for legal fees and costs.

The panel issued the eight-page Final Award of Arbitrators on November 14, 2014, awarding net attorneys' fees and costs to respondent in the total amount of $730,555. The final award states that the administrative fees of the American Arbitration Association totaling $32,400 shall be born be borne 45% by respondent and 55% by petitioners. Accordingly, petitioners were directed to reimburse respondent the sum of $215,171.12.

To summarize, the total amounts awarded to respondent by the panel under the partial final award dated March 14, 2014, and the final award dated November 14, 2014, are as follows:

a) the sum of $125,320.23 as damages for the Weiss brothers fraud and underpayment to respondent;

b) the sum of $730,555.00 in net attorneys' fees;

c) the sum of $215,171.12 as reimbursement for AAA fees and expenses paid by respondent; and

d) no punitive damages.

Discussion

It is well settled that judicial review of an arbitration award is extremely

limited, and New York's "courts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined" (Frankel v. Sardis, 76 AD3d 136, 139 [1st Dept 2010] [internal quotation marks and citations omitted]). So strong is New York's public policy favoring arbitration as an efficient means of resolving parties' claims, that New York's courts have consistently confirmed arbitration awards despite well reasoned and well articulated opposition based upon errors of fact or law (see Hackett v. Milbank, Tweed, Hadley & McCloy, 86 NY2d 146, 150, 155 [1995]). Under CPLR 7511, New York sets forth its exclusive grounds for vacating an arbitration award. The statute, at subsection (b) (1), states that an award:

> "shall be vacated on the application of a party who . . . participated in the arbitration . . . 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 . . . ; or (iii) an arbitrator . . . making the award exceeded his power . . . ; or (iv) failure to follow 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 failure to establish the existence of any one of these grounds mandates confirmation of the award (see Matter of New York State Nurses Assn. [Nyack Hosp.], 258 AD2d 303, 303 [1st Dept], appeal denied 93 NY2d 810 [1999]).

Petitioners' first contention is that the arbitration panel engaged in

prejudicial misconduct by requesting additional compensation from the parties prior to rendering the Final Award.

The arbitration panel sent an email to the parties on September 17, 2014, stating as follows:

> Upon reviewing the file with the panel, it was discovered that both Messrs. Grubin and Martins had additional invoices for time incurred that had not been entered for payment at the time Neda [the AAA Administrator] advised counsel of the outstanding balance.
>
> The correct balance due for time incurred is $72,764.22.
>
> In order for this matter to proceed the panel orders that the full outstanding balance be paid and in addition, they order that an additional $15,000 from each party be submitted to cover anticipated time spent reviewing the aformentioned information and issuing a final award.
>
> Payment of all deposits is to be submitted by October 6, 2014.

(Chaitman Aff., exhibit C; see also Final Award at 2).

Petitioners contend that the panel's refusal to continue with the proceeding unless the parties met its demand for additional fees was unethical.

There is no pre se rule that communications between an arbitrator and the parties concerning fees after the commencement of the arbitration proceeding constitute misconduct impairing the integrity of the arbitration process (Matter of Montague Pipeline Tech. Corp. v. Grace-Lansing & Grace Indus., 238 A.D.2d 510

[2d Dept., 1997]). Rather, the court must examine the particular facts and circumstances of each case to reach an appropriate determination (id.)

Here, we find that the panel acted evenhandedly in directing each party to pay an additional amount. Under such circumstances, this Court finds that the panel's midhearing request for additional fees involved no impropriety (Matter of Radin (Kleinman), 299 A.D.2d 236, 236 [1st Dept., 2002]).

Petitioners' second contention is that the panel has rewritten the parties' agreement by altering the attorneys' fee provision.

Section 8.4 of the parties' agreement states as follows:

> The cost of the arbitration, including reasonable attorney's fees, shall be borne by the party against whom the decision of the arbitrators is rendered, or if the decision is rendered in part against more than one party, in proportion to the relative awards.

Petitioners assert that, under the agreement, attorneys' fees are not a category separate from "cost of the arbitration," but are a part of those costs. Petitioners note that the arbitration panel divided the AAA costs 60% against respondent and 40% against petitioners, but the panel used different percentages for the attorneys' fees. Further, petitioners contend that the agreement required the award of attorneys' fees to be based upon the relative awards made to the parties, but the panel meted out its own formulation of counsel fees by

disqualifying petitioners from any attorneys' fee award and by awarding respondent attorneys' fees that greatly exceeded the amount of her recovery.

Petitioners' contention is without merit. As the Final Award reflects, the arbitrators read section 8.4 of the parties' agreement very carefully. The panel wrestled with the question of which party was the "prevailing" or "successful" party. In addition, the panel considered case law, including the First Department's opinion in Wiederhorn v. Meikin, 98 A.D.3d 859, 862-63 [1st Dept., 2012]. The panel examined, in its own words, "who won what, and its import."

Contrary to petitioners' contention, the Court finds that the extensive, nuanced findings of the Final Award reflect that the panel did not ignore the provisions of the parties' agreement, did not exceed its power, and made entirely rational decisions (Burke v. Sobral, 2015 WL 1471565 [1st Dept., 2015]).

Petitioners' third contention is that the panel violated the agreement by awarding respondent fees that were unreasonable.

Over five pages of the Final Award are devoted to the issue of which party was entitled to an award of attorneys' fees and the amount of such fees (Final Award, pp. 3-8).

This Court has reviewed the text of the arbitration panel's Final Award line-by-line. In short, we find that the arbitration panel analyzed the history of the

underlying litigation thoroughly and accurately and awarded an appropriate amount based on the specific facts of this case.

Petitioners' fourth contention is that the attorneys' fees awarded were disguised punitive damages, which are prohibited by New York law.

It is important to note that the Final Award on its face explicitly denies respondent's request for exemplary damages (Final Award, p. 3). Petitioners' argument that the arbitrator's award is tantamount to punitive damages is based entirely on a subjective interpretation of the Final Award.

The Court disagrees with petitioners' subjective interpretation, so the Court declines to overturn the Final Award on such grounds.

Petitioners' final contention is that the Court should deny respondent's application for: 1) costs and reasonable attorneys' fees in confirming the award; 2) post-award, pre-judgment interest; and 3) post-judgment interest.

"[U]pon confirmation of an arbitrator's award, interest should be provided from the date of the award" (Board of Ed. of Cent. School Dist. No. 1 of Towns of Niagara, Wheatfield, Lewiston and Cambria v. Niagara-Wheatfield Teachers Ass'n, 46 N.Y.2d 553, 558 [1979]). Unless the parties provide otherwise, interest on the award is due from the date of the award to the entry of judgment (Kavares v. Motor Vehicle Acc. Indemnification Corp., 29 A.D.2d 68 [1st Dept., 1967],

order aff'd, 28 N.Y.2d 939 [1971]).

Finally, respondent seeks the costs and reasonable attorneys' fees incurred in confirming the award.

Respondent is not entitled to an award of attorneys' fees and costs under section 8.4 of the parties agreement, for that provision on its face only covers the cost of arbitration, not litigation in court pertaining to a motion to confirm. The general rule in New York is that a party may not be awarded attorneys' fees as part of damages unless such relief is specifically authorized by statute, court rule or contract (Flemming v. Barnwell Nursing Home & Health Facilities, Inc., 15 NY3d 375 [2010]). Here, the respondent points to no statutory or contractual basis for awarding her attorneys' fees for the motion to confirm.

Accordingly, it is

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

Settle judgment on notice.

Date: April 10, 2015
New York, New York

Anil C. Singh