Matter of Doctor's Assoc. Inc. v Mbengue
2015 NY Slip Op 31811(U)
September 24, 2015
Supreme Court, New York County
Docket Number: 651821/15
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

DOCTOR'S ASSOCIATES INC.,

Petitioner,

Index No. 651821/15

-against-

DECISION/ORDER

ANOUNE MBENGUE,

Respondent,

For an Order pursuant to Article 75 of the CPLR
Confirming an Arbitration Award.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross-Motion and Affidavits Annexed.....	2
Affirmation in Opposition to Cross-Motion.....	3
Affirmation in Reply.....	4
Exhibits.....	5

Petitioner Doctor's Associates Inc. commenced the instant proceeding seeking an Order pursuant to CPLR § 7510 confirming an arbitration award made in favor of petitioner and against respondent Anoune Mbengue and for judgment thereon. Respondent cross-moves for an Order pursuant to CPLR § 7511 vacating the arbitration award. For the reasons set forth below, the petition is granted and respondent's cross-motion is denied.

The relevant facts and procedural history of this case are as follows. Petitioner is the owner of the proprietary system for establishing and operating restaurants featuring sandwiches

and salads under its trade name and service mark SUBWAY (the "SUBWAY System"). On or about February 10, 2009, petitioner, as franchisor, and respondent, as franchisee, entered into a written franchise agreement for respondent to operate SUBWAY Sandwich Shop #46748 (the "Franchise Agreement #46748"). On or about July 31, 2012, petitioner, as franchisor, and respondent, as franchisee, entered into a written franchise agreement for respondent to operate SUBWAY Sandwich Shop #56904 (the "Franchise Agreement #56904") (hereinafter collectively referred to as the "Franchise Agreements"). Additionally, on or about July 31, 2012, respondent executed Subway Equipment Lease #11514 for certain equipment to be used in connection with his operation of SUBWAY Sandwich Shop #56904 (the "Lease").

Pursuant to the Franchise Agreements, respondent was obligated to pay petitioner a weekly Royalty of 8% and weekly Advertising Fees of 4.5% to the Subway Franchisee Advertising Fund Trust ("SFAFT"). Additionally, pursuant to the Lease, respondent was required to make monthly payments from his pre-authorized bank account. In June 2014, respondent and petitioner entered into a Payment Plan Agreement pursuant to which respondent would pay petitioner past due Royalties and Advertising Fees in the sum of $67,146.64. Specifically, the Payment Plan Agreement states, in pertinent part, as follows:

> The parties agree that any dispute, controversy or claim arising out of or relating to this payment plan or any franchise agreement between the parties of this agreement or any breach thereof, shall be settled by arbitration as set forth in paragraph 10 of the franchise agreement. The parties agree that the arbitration shall be administered by the American Dispute Resolution Center, in accordance with its administrative rules. The parties specifically waive the right to an arbitration hearing and agree that the arbitration shall be by submission of documents before a single arbitrator. Judgment rendered by the Arbitrator may be entered in any court having jurisdiction thereof.

Petitioner alleges that respondent breached the Payment Plan Agreement and the Franchise Agreements. Thus, on or about September 30, 2014, petitioner filed a Demand for Arbitration (the "Demand") with the American Dispute Resolution Center, Inc. (the "ADR Center"), which was also sent to respondent via FedEx.

In or around October 2014, a Case Manager from the ADR Center mailed to petitioner and respondent, at one of respondent's Subway restaurants, a notice confirming receipt of petitioner's Demand and enclosed a list of arbitrators for the parties' review. Additionally, the notice stated that "[i]f the Respondent wishes to file an answer and/or counterclaim, please file with this office in duplicate, with the appropriate filing fee, within ten (10) calendar days from the date of this letter, with a copy to opposing counsel." Further, the notice stated that "[i]n order to expedite this matter, Claimant has requested that we proceed by submission of documents. Therefore, unless informed to the contrary within (10) ten days of the date of this letter, we will assume that Respondent has no objections to Claimant's request and we will proceed by submission of documents."

As respondent failed to respond to said notice, in a letter dated October 22, 2014, the ADR Case Manager notified the parties that Arbitrator George R. Faulkner, Esq. ("Arbitrator Faulkner") was selected as the arbitrator in the matter. Additionally, the letter states that "[a]s this matter will be heard by documents only, the parties shall forward a set of documents to the opposing party, with a copy to the ADR Center for distribution to the arbitrator, by the close of the business day on or before December 1, 2014. After reviewing the documents, the Arbitrator will advise whether or not any additional information will be required." On or about October 23, 2014, petitioner filed an Amended Demand with the ADR Center to include a claim based

upon respondent's failure to make the monthly payments under the Lease.

In or around November 2014, petitioner requested an extension of its time to submit documents to Arbitrator Faulkner until December 16, 2014 and forwarded the request to respondent via e-mail. On or about December 15, 2014, petitioner sent via Fed-Ex the evidence package which petitioner intended to submit for arbitration to the ADR Center and respondent. However, on or about December 19, 2014 and against on December 22, 2014, counsel for respondent wrote to the ADR Center claiming that the arbitration proceeding was stayed by operation of law due to the bankruptcy filing of Sub Holding, LLC. Petitioner challenged the claim and statements from both sides were submitted to the Arbitrator. On or about January 14, 2015, Arbitrator Faulkner ruled that the automatic stay did not apply and issued an Order to that effect. Arbitrator Faulkner then gave respondent an additional seven days to submit any documents or evidence in the arbitration proceeding. However, respondent failed to submit any documentation.

Thereafter, on or about February 11, 2015, Arbitrator Faulkner issued the award (the "Award") pursuant to which he, *inter alia*, found that respondent breached both the Franchise Agreements and the Lease; terminated the Franchise Agreements and the Lease; and awarded petitioner the sum of $75,618.87, including $29,820.01 in Royalties, $14,885.05 in Advertising Fees and $30,913.82 in monthly payments pursuant to the Lease. Also on February 11, 2015, respondent filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York. Thereafter, petitioner moved for an Order, *inter alia*, vacating the automatic stay imposed under 11 U.S.C. § 362(a). On or about April 28, 2015, U.S. Bankruptcy Judge Martin Glenn granted the motion insofar as he, *inter alia,* ordered that the

automatic stay be vacated for the sole purpose of allowing petitioner to commence an action in State Court to confirm the Award. Petitioner now moves to confirm the Award and respondent cross-moves to vacate the Award.

The court first turns to respondent's cross-motion for an Order pursuant to CPLR § 7511 vacating the Award. A party aggrieved by an arbitration award may move to vacate the award pursuant to Article 75 of the CPLR. Specifically, CPLR § 7511(a) states that "[a]n application to vacate or modify an award may be made by a party within ninety days after is [sic] delivery to him." Pursuant to CPLR § 7511(b),

> 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
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> (i) corruption, fraud or misconduct in procuring the award; or
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> (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.
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> 2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:
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> (i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

"Courts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined." *Goldfinger v. Lisker*, 68 N.Y.2d 225, 230 (1986). "Even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice." *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 (1999).

In the instant action, respondent's cross-motion for an Order vacating the Award is denied on the ground that respondent has failed to establish a basis for the vacatur of the Award. Respondent's assertion that the Award should be vacated because he was provided just one day's notice of the December 16, 2014 arbitration hearing is without merit. As an initial matter, respondent was notified of the arbitration Demand by both petitioner and the ADR Center in October 2014. Further, there was never an actual "hearing" scheduled as the parties had agreed not to hold a hearing but rather to have the arbitration decided upon the submission of documents. Indeed, December 16, 2014 was the date scheduled for the submission of documents in the arbitration proceeding. Further, Arbitrator Faulkner twice extended respondent's time to submit documents supporting its arguments until February 10, 2015 and respondent still failed to submit any documentation.

Additionally, respondent's assertion that the Award should be vacated based upon

Arbitrator Faulkner's alleged misconduct in refusing to grant an adjournment of the arbitration to respondent is without merit. Respondent has not established that he made any adjournment requests to Arbitrator Faulkner. Moreover, Arbitrator Faulkner wrote to respondent's counsel following the submission date to give respondent additional time to submit documents if he wished to do so.

Finally, respondent's assertion that the Award should be vacated based upon petitioner's failure to serve respondent with a notice of intention to arbitration notifying respondent that he may apply to stay the arbitration within twenty days of service of the notice pursuant to CPLR § 7503(c) is without merit. Indeed, CPLR § 7503(c) does not require said notice but only states that if such notice is given to a respondent, it may serve to preclude the respondent from attacking the arbitration award on the basis of any of the threshold defenses that the dispute was not arbitrable or that it was barred by the statute of limitations, which are not at issue here.

Accordingly, the cross-motion to vacate the Award is denied and the petition to confirm the Award is granted. It is hereby

ORDERED and ADJUDGED that the petition is granted and the Award rendered in favor of petitioner and against respondent is confirmed. Settle order and judgment.

Dated: 9/28/15

Enter: OK
J.S.C.
CYNTHIA S. KERN
J.S.C