

**National Union v Odyssey**

2016 NY Slip Op 30579(U)

April 5, 2016

Supreme Court, New York County

Docket Number: 162684/2014

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL R. EDMEAD  
J.S.C.  
Justice

PART 35

National Union  
-v-

INDEX NO. 162684/14

MOTION DATE 2/9/16

MOTION SEQ. NO. 001

Odyssey

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ **No(s).** \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ **No(s).** \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ **No(s).** \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

The petition under Index No. 162684/2014 and petition (Index No. 651067/2015) are consolidated for joint disposition herein as follows:

In this action arising out of an attempt to arbitrate an insurance payment dispute, National Union Fire Insurance Co. of Pittsburgh, PA (“National Union”) petitions this Court for an order appointing an umpire from among the two candidates<sup>1</sup> it proposed for its arbitration with respondent Odyssey Reinsurance Company (“Odyssey”).

According to National Union, it, as the reinsured, and Odyssey, as the insurer, are parties to a certain Reinsurance Agreement, under which Odyssey failed to pay certain amounts due thereunder. National Union contends that Section 5 of the Federal Arbitration Act (“FAA”) requires the Court to enforce the arbitrator/umpire selection procedure outlined in the arbitration clause of the Reinsurance Agreement. Under the arbitration clause, the parties are required to arbitrate disputes in accordance with a certain process of selecting arbitrators and/or an umpire to determine the dispute. National Union claims that Odyssey failed to abide by the selection process by ignoring several attempts National Union (or its party-appointed arbitrator) made to engage Odyssey in the process, and that this Court should therefore appoint one of the two

<sup>1</sup> After filing the petition, petitioner learned that a third candidate it initially proposed commenced a business relationship with Odyssey, and therefore, withdrew his name from consideration.

Dated: \_\_\_\_\_, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

qualified umpire candidates proposed by National Union in accordance with the Reinsurance Arbitration clause.

In opposition, Odyssey contends that an umpire has not been selected due solely to the three and four-year delay in National Union's request to appoint an umpire, and the failure of National Union's party-appointed arbitrator to engage in discussions with Odyssey's party-appointed arbitrator at an industry dinner event or respond to an email. Odyssey points out that National Union never proposed the three umpire candidates to Odyssey, who are unsuitable to serve as umpire in any event. Odyssey maintains that National Union's failure to redact the names of its three candidates in this proceeding creates a grave risk that their candidates are now aware of their nomination by National and have potential bias and/or the appearance of partiality resulting from such knowledge. Odyssey also contends that National Union's candidates have been selected by National Union and its current counsel in prior matters, in which Odyssey's affiliates have challenged, and lack the experience necessary to decide the reinsurance, casualty insurance and liability claims at issue. However, the four candidates on Odyssey's list have no prior relationships with any of the parties, and are experienced in the matters at issue in arbitration. Therefore, argues Odyssey, the Court should appoint one of the four umpire candidates from its list.<sup>2</sup>

In response, National Union argues that its candidates are not biased and are qualified to serve. A casual conversation at a dinner event of the status of the case does not constitute a meaningful attempt to discuss umpire selection. The Reinsurance Agreement does not require that the request for umpire selection occur within any specific time period after an arbitration demand is served. Odyssey has a history of gamesmanship in the selection process in other similar proceedings such as this one and should not be rewarded with its choice of candidates for its refusal to engage in the selection process.

In further support of its petition, Odyssey maintains that National Union is the party responsible for the delay in this matter moving forward to arbitration, and points out that National Union has not objected to Odyssey's candidates.

#### *Discussion*

According to both parties, the arbitration clause in the Reinsurance Agreement requires them to arbitrate their dispute before a tripartite panel composed of one arbitrator appointed by each party and a third arbitrator or umpire to be selected by the two party-appointed arbitrators (National Union Memorandum of Law in Support of its Petition, Preliminary Statement, p. 1; Odyssey Memorandum of Law in Support of its Petition, Preliminary Statement, p. 1).<sup>3</sup> Both

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<sup>2</sup> Odyssey filed a separate petition seeking an order appointing an umpire from among the four candidates it proposed.

<sup>3</sup> Article 11 of the Reinsurance Agreement provides:

All disputes . . . arising out of the interpretation of this Agreement shall be submitted to the decision of two arbitrators, one to be chosen by each party, and in the event of the arbitrators failure to agree, to the decision of an umpire to be chosen by the arbitrators. The arbitrators and umpire shall be disinterested. . . . If either of the parties fails to appoint an arbitrator within one month after being required by the other party in writing to do so, or if the arbitrators fail to appoint an umpire within one month of a request in writing by

parties agree to the Court's authority to appoint an umpire under the Reinsurance Agreement and the FAA.

The record indicates that on December 31, 2009, National Union served a demand for arbitration, and in 2011, the parties appointed their respective arbitrators. National Union chose Charles Foss ("Foss") and Odyssey chose Jonathan Rosen ("Rosen").

Approximately four years later, on March 18, 2014, National Union wrote Odyssey a letter citing the arbitration clause's requirement that the party arbitrators "agree upon an umpire 'within one month of a request in writing by either of them to do so'" and advised that such letter served as National Union's "request that Odyssey engage in umpire selection in good faith so that we can agree on a mutually-acceptable umpire within the coming month." Odyssey did not respond.

On June 20, 2014, National wrote Odyssey reconfirming that Foss was its appointed arbitrator, and reiterating its request that Odyssey "instruct Mr. Rosen to attempt to reach agreement on an umpire within 30 days." Again, Odyssey did not respond.

On August 10, 2014, Foss (for National) wrote to Rosen (for Odyssey) "requesting that you engage in the process to select a third panel member." Foss stated, "The treaty gives us 30 days to complete that process and I am hopeful that we can agree on a suitable candidate. . . ." Later that same date, Rosen responded that he "will confirm with Clearwater that I am still in play and, if so, will shoot on communicating with you as soon as possible after my return."

There is no indication that either the parties or the arbitrators appointed any umpire by the time the 30-day period expired, at the latest, on September 10, 2014. Therefore, since the parties and their appointed arbitrators failed to choose an umpire within one month after National requested Odyssey to do so, National was entitled to request that this Court choose an umpire.

Contrary to Odyssey's contention, that National confirmed, in its initial March 18, 2014 letter, that Foss remained its party-appointed arbitrator is inconsequential.

And, while Odyssey claims that upon Rosen's return from vacation, he called Foss to discuss umpire selection, there is no affidavit attesting to such, and the email upon which Odyssey relies demonstrates that a phone call from Rosen to Foss was made on January 20, 2015 *after* National filed its instant petition, wherein Rosen advised that he "had been notified by Clearwater that [National] would like to advance matters in this proceeding. Please give me a call so we can discuss how best to proceed."

Further, Odyssey's additional claim that Rosen asked Foss at an industry gala dinner in November 2014 to discuss umpire selection, to which Foss "apparently" responded that he had not spoken to National's counsel for a while and could not engage in the discussion, does not constitute a good faith attempt by either Odyssey or Rosen to engage an umpire, especially within the time frame set forth by the arbitration agreement. In any event, such belated attempt by

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either of them to do so, such arbitrator or umpire, as the case may be, shall at the request of either party be appointed by a Justice of the Supreme Court of the State of New York.

Rosen to engage Foss at a gala event is disputed<sup>4</sup> and insufficient nevertheless.

And, contrary to Odyssey's contention, that National waited until March 18, 2014, four years after filing a demand for arbitration, and three years after appointing its arbitrator, to engage Odyssey in selecting an umpire is of no moment. The arbitration agreement does not set forth any time frame within which to request an umpire after the selection of a party-appointed arbitrator or after the demand for arbitration is served.

As to National's two candidates, "it has been stated that "[p]recisely because arbitration awards are subject to ... judicial deference, it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded" (*Kern v. 303 East 57th Street Corp.*, 204 A.D.2d 152, 611 N.Y.S.2d 547 [1<sup>st</sup> Dept 1994]). "The 'basic, fundamental principles of justice require complete impartiality on the part of the arbitrator and mandate that the proceedings be conducted without any appearance of impropriety'" (*id.*). It "is only necessary to demonstrate the potential for bias to find misconduct" (*id.*).

Here, the qualifications and work histories of the two candidates proposed by National Union satisfy the stated criteria in the arbitration clause that they "are active or retired executive officials of fire or casualty insurance or reinsurance companies. . . ." (See Article 11 (A)). Notably, the arbitration agreement does not require that the umpire have any specific "experience" in any specialized area of insurance or reinsurance, as Odyssey seeks to impose. Further, the fact that the names of National Union's candidates were not redacted or shielded from discovery by the candidates in this proceeding is insufficient to establish bias to warrant disqualification from service as an umpire in the present arbitration.

However, Odyssey's claim of *possible* bias or *appearance* bias, in favor of National Union and against Odyssey is supported by the fact that Odyssey has publically challenged one of National Union's candidate's suitability to serve as an umpire in another matter and that National Union has nominated both candidates in many previous arbitrations.

As to Odyssey's candidates, National Union admits that such candidates are certified to serve as umpires (Answer to Petition, ¶30). And, National Union has not challenged the neutrality or qualifications of Odyssey's candidates. Therefore, upon review of the submissions, the Court appoints as umpire James Phair, who undisputedly bears no prior or current relationship with either party in any capacity.

Nevertheless, based on oral argument, the parties' submissions, and National Union's application, the Court finds that Odyssey and Odyssey's arbitrator's failure to cooperate or otherwise engage National Union's arbitrator in the selection of an umpire pursuant to the arbitration agreement entitles National Union to attorneys' fees resulting from filing its petition.

Based on the foregoing, it is hereby

ORDERED that National Union Fire Insurance Co. of Pittsburgh, PA's petition under Index No. 162684/2014 is granted to the extent that the Court appoints James Phair as the umpire in the underlying arbitration; and is further

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<sup>4</sup> While Rosen "recall[ed]" speaking to Foss at the gala dinner where Foss purportedly "told [Rosen] that he had no instructions to proceed, but would let [Rosen] know if circumstances changed," Foss did "not recall" saying such, and pointed out that since Foss was "the one who originally attempted to contact [Rosen], it seem[ed] that [he] did have instructions." (See January 22, 2015 email exchange).


ORDERED that National Union is entitled to reasonable attorneys' fees from Odyssey in connection with filing and defending National Union's petition under Index No. 162684/2014, and the issue of reasonable attorneys' fees so incurred is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for National Union shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the petition under Index No. 651067/2015 is dismissed as moot based on the above.

This constitutes the decision and order of the Court.

Dated 4/5/16

ENTER:   
HON. CAROL R. EDMOND, J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION  
Check if appropriate:       DO NOT POST       REFERENCE