Power v O'Brien
2019 NY Slip Op 30066(U)
January 8, 2019
Supreme Court, New York County
Docket Number: 653523/2018
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ILLAN POWER,

Petitioner,

-against-

DEIDRE O'BRIEN, ESQ.,

Respondent.

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DECISION AND ORDER
Index No.: 653523/2018
Motion Sequence 001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this Article 75 Action, Petitioner Illan Power (Petitioner) moves to vacate an arbitration award issued in favor of Respondent Deidre O'Brien, Esq. (Respondent). Respondent opposes the motion and cross-moves for an order affirming the arbitrator's award and declaring that Respondent is entitled, as to fees in the amount awarded by the arbitrator, $2,450, plus costs and disbursements. For the reasons set forth below, the Court denies the petition, grants the cross motion and confirms the award.

BACKGROUND FACTS

This action arises out of a fee dispute following the dissolution of an attorney-client relationship. From 2011 to 2017, Petitioner had retained Respondent's law firm to provide various services related to business immigration matters. In February 2017, Petitioner hired Respondent to handle the application for an EB 1-1 Visa for an alien worker on behalf of one of Petitioner's companies (NYSCEF doc No. 2). After Petitioner was unsatisfied to learn of the progress that had been made on the application, he sent notice terminating their attorney-client

relationship in July 2017 (NYSCEF doc No. 4). In August 2017, Respondent sent Petitioner an invoice totaling $2,450, reflecting fees for work Respondent had commenced for the Visa application before she received the notice of termination, as well as for services performed on an earlier unrelated matter (NYSCEF doc No. 16). Petitioner responded by offering to pay the undisputed sum of $700 owed for the earlier work but was unwilling to pay the remainder of the $2,450 (NYSCEF doc No. 20). Respondent declined to accept the $700 payment but offered to settle the entire matter for $2,000 (*Id.*). Petitioner then informed Respondent that the matter had been sent to the New York County Lawyers Association (NYCLA) for arbitration (*Id.*).

The arbitration hearing was originally scheduled for March 2018 and was later adjourned to June 4, 2018 due to Petitioner's schedule (*Id.*). When Petitioner learned that Respondent, who operates a New York office but lives in Ireland, had arranged to call in to the hearing, he attempted to withdraw from the proceeding (NYSCEF doc No. 14). He was then informed by the arbitrator's office that a client may not withdraw from the proceeding after the office's administrator has received the "Attorney Fee Response" (*Id.*). In response, Petitioner requested that Respondent be subpoenaed to attend the hearing in person (*Id.*). After the request was denied, Petitioner refused to attend the hearing, citing unfairness (NYSCEF doc No. 1). The arbitrator proceeded with the hearing and issued an award in Respondent's favor for the full amount owed.

Petitioner now moves, pursuant to CPLR 7511(b)(1), to vacate the award on the grounds that the arbitrator exceeded their power by moving forward with the hearing and erred procedurally by issuing the award against Petitioner as an individual and not as a corporation. Petitioner also claims he was unfairly prejudiced for being required to attend in person, while the

arbitrator denied his request to subpoena Respondent. Petitioner additionally claims the arbitrator did not properly find a valid agreement to arbitrate between the parties. In reply, Respondent asks the Court to dismiss the petition in its entirety, and award judgment in favor of Respondent in the amount of the full arbitration award, plus costs and disbursements and any further relief the Court deems just and proper.

DISCUSSION

New York state public policy strongly favors arbitration, and encourages the proceedings "as a means of conserving the time and resources of the courts and the contracting parties" (*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975], *see also Maross Constr., Inc. v Central N.Y. Regional Transp. Auth.*, 66 NY2d 341, 345 [1985]). It is "a well-established rule that an arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone v New York Cent. Mut, Fire Ins. Co.*, 15 NY3d 530, 534 (2013). Judicial review of arbitration awards is therefore very narrow in scope, and an award is typically only vacated "where the award is violative of a strong public policy, is irrational, or clearly exceeds a specific limitation on an arbitrator's power" (*Matter of New York City Tr. Auth. v Phillips*, 162 AD3d 93, 75 N.Y.S.3d 133 [1st Dept 2018] [internal citation and quotation marks omitted]). As to irrationality, CPLR 7511(b)(1)(iii) permits a court to vacate an arbitrator's award where the arbitrator so imperfectly executed his or her power such that a final and definite award upon the subject matter was not made. Additionally, awards may be vacated if the Court finds corruption, fraud or misconduct was involved in procuring the award, or partiality by the arbitrator to one of the parties. Under CPLR 7511(b)(2), a party who did not participate in the arbitration may ask

the Court to vacate an award when the rights of that party were prejudiced, or a valid agreement to arbitrate was not made or complied with.

Here, Petitioner argues that the arbitrator exceeded its power by making the award against him personally. An arbitrator exceeds his or her power under CPLR 7511(b)(1)(iii) when the award gives a "completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties" (*see Matter of Pine Plains Cent. School Dist. v Kimball,* 272 AD2d 332, 333, 708 NYS2d 306 [2000], quoting *Matter of National Cash Register Co. [Wilson],* 8 NY2d 377, 383, 208 NYS2d 951[1960]; *Matter of Silverman [Benmor Coats],* 61 NY2d 299, 308, 473 NYS2d 774 [1984]). Thus, even in circumstances where the arbitrator makes some mistake of fact or law, the award is not subject to vacatur "unless the court concludes that it is totally irrational or violative of a strong public policy" (*Hackett v Milbank, Tweed, Hadley & McCloy,* 86 NY2d 146, 155 [1995]). Petitioner argues he was prejudiced by the award being written against him and not his corporation. In response, Respondent counters that his personal name is what was listed on the Client Request for Fee Arbitration form given to the NYCLA (NYSCEF doc No. 11, ¶ 2 under index No. 653523/18). Regardless, this factual dispute does not constitute an irrational abuse of power violating public policy that would require vacatur.

Petitioner also claims he was prejudiced because he was not allowed to withdraw from the arbitration, but this argument is also without merit. The Local Program Rules for the NYCLA's Attorney-Client Fee Dispute Resolution Program clearly state that:

> "The client may not withdraw from the process after the Administrator has received the "Attorney Fee Response." If the client seeks to withdraw at any time after the Administrator receives the "Attorney Fee Response," the withdrawal will

> have no effect and arbitration will proceed as scheduled whether or not the client appears. A decision will then be made on the basis of the evidence presented."

(Part 137 Fee Dispute Resolution Program, Section 137.6 [g]).

After this rule, which applies equally to the attorney's participation, was relayed to Petitioner, he nevertheless sent an email to the arbitrator informing it of his decision to withdraw (NYSCEF doc No. 14). Petitioner therefore cannot claim he was prejudiced by the hearing having gone forward as scheduled, as he was informed that would be the case in line with the NYCLA's clearly disclosed policies and procedures. Petitioner also claims he was unfairly prejudiced by Respondent's calling into the arbitration. However, email correspondence indicates that Petitioner was also afforded the opportunity to call in if he wished to do so (*Id.*). He responded to this offer by requesting that Respondent be subpoenaed to personally appear and when that request was denied as untimely, he went through with his withdrawal, despite having been given notice that his withdrawal would have no effect (*Id.*).

Petitioner has not offered any evidence indicating that he was unfairly prejudiced or that the arbitrator exceeded its power. He has merely demonstrated that he does not agree with the arbitrator's procedures, but dissatisfaction with the outcome of an arbitration and the rules of the arbitrator are not grounds for vacatur. Nothing introduced by Petitioner suggests that the arbitrator's decision was irrational or violative of public policy, and the Court is obligated to give considerable deference to the arbitrator's decision, since "an arbitrator's paramount responsibility is to reach an equitable result, and the courts will not assume the role of overseers to mold the award to conform to their sense of justice" (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629 [1979]). Petitioner's claim that the award should be vacated as there was no agreement to

arbitrate between the parties is also without merit since Petitioner was the party who moved for arbitration, and under the Party 137 Fee Dispute Resolution Program, arbitration is mandatory when requested by the client (Part 137 Fee Dispute Resolution Program Section 137.2 [a]).

Accordingly, because Petitioner has failed to demonstrate the existence of any basis for vacatur of the award under the grounds set forth in CPLR 7511, the award is confirmed in its entirety.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED and that the petition of Petitioner Illan Power is denied in its entirety; and it is further

ORDERED that Respondent's cross motion is granted; and it is further

ORDERED AND ADJUGED that the award made by the New York County Lawyers' Association, pursuant to the mandatory Party 137 Fee Dispute Program, in the matter captioned *Matter of Illan Power and Deidre O'Brien, Esq.* New York County Lawyers' Association Case Number 2017-148, dated June 4, 2018, is hereby confirmed; and it is further

ORDERED AND ADUDGED that Respondent Deidre O'Brien, Esq. is entitled to the sum of $2,450.00 with costs and disbursements from Petitioner Illann Power; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that Respondent shall serve a copy of this order, along with notice of entry, on all parties with 15 days of entry.

Dated: January 8, 2019

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD J.S.C.