

Mullins v Crowley

2022 NY Slip Op 33932(U)

November 21, 2022

Supreme Court, Westchester County

Docket Number: Index No. 65267/2022

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

RECEIVED NYSCEF 11/21/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

ANDREW MULLINS and PHILIP ANDREWS LLC,

Petitioners,

-against-

ALAN CROWLEY,

Respondent.

Index No. 65267/2022

DECISION AND ORDER

The following papers numbered 1 to 5 were read on the motion (seq. no. 1) by petitioners Andrew Mullins ("Mullins") and Philip Andrews LLC ("the Company") (together, "petitioners") pursuant to CPLR § 7510 for an Order confirming the Arbitration Award dated September 17, 2022 (the "Award") issued in American Arbitration Association Case No. 01-21-0002-7332 (the "Arbitration"):

<u>Papers</u>	<u>Numbered</u>
Amended Notice of Petition	1
Verified Petition and Exhibits	2
Affirmation and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Memorandum of Law in Reply	5

The following papers numbered 1 to 4 were read on the cross-motion (seq. no. 2) by respondent Alan Crowley

("respondent") pursuant to CPLR §§ 404, 406 and 7511 for an Order: (1) dismissing the Verified Petition dated September 20, 2022 in this special proceeding (the "Petition"); and (2) vacating the Award:

<u>Papers</u>	<u>Numbered</u>
Notice of Cross-Motion	1
Affirmation and Exhibits in Support	2
Memorandum of Law in Support	3
Memorandum of Law in Opposition	4

BACKGROUND

This special proceeding was commenced on September 21, 2022 by the filing of the Petition, which seeks to confirm the Award pursuant to CPLR § 7510. See NYSCEF Doc. Nos. 1-23. In sum and substance, the Petition alleges that Mullins and respondent were both members of the Company, which entity owned and operated a construction business, and that amidst escalating tensions between Mullins and respondent, in November of 2019 the pair decided to separate their business interests from one another. See NYSCEF Doc. No. 1 at ¶¶ 1-7. The Petition further alleges that after numerous attempts to resolve issues relating to the financial terms of separation failed, Mullins initiated the Arbitration against respondent on April 15, 2021. See *id.* at ¶¶ 8-9. The Petition alleges that the parties jointly selected

Mark C. Morrill, Esq. (the "Arbitrator") to arbitrate their dispute, and that the Arbitrator issued a series of procedural orders and determined two applications for interim relief prior to conducting the arbitration hearing virtually from March 15, 2022 through March 18, 2022 (the "Hearing"). See *id.* at ¶¶ 10-12. It further alleges that during the Hearing, Mullins presented testimony and evidence from three witnesses; respondent presented testimony and evidence from four witnesses; and the parties each submitted post-hearing briefs and additional submissions prior to the formal closing of the Hearing on June 3, 2022. See *id.* at ¶¶ 12-13.

The Petition alleges that the Arbitrator subsequently issued the Award, which expressly incorporated the Arbitrator's prior determinations regarding applications for interim relief. See *id.* at ¶¶ 14-17. It further alleges that the Award provided, *inter alia*, that: (1) respondent shall pay Mullins \$321,391.59 in the final accounting of joint ownership of the Company; (2) Mullins will be deemed to have purchased respondent's 50 percent ownership in the Company; (3) each party's respective claim that the other breached a fiduciary duty and/or took excessive draws from the Company is denied; (4) any amount that the Company owes to non-party H.R. Solutions & Support in excess of \$26,500 is the sole responsibility of

respondent; and (5) the parties shall equally bear the costs of the Arbitration, including compensation for the Arbitrator. See *id.* at ¶ 18. The Petition further alleges that the Award was delivered to counsel for all parties on September 20, 2022; that the Petition was filed less than one year after that delivery; and that the Award has not been vacated or modified pursuant to CPLR § 7511. See *id.* at ¶¶ 19-20.

On October 17, 2022, respondent opposed the Petition and cross-moved (seq. no. 2) pursuant to CPLR §§ 404, 406 and 7511 for an Order dismissing the Petition and vacating the Award. See NYSCEF Doc. Nos. 55-84. In opposition to the Petition and in support of his cross-motion, respondent contends that in issuing the Award the Arbitrator exceeded his authority and was "irrational." See NYSCEF Doc. No. 84 at pp. 3-12. Specifically, respondent asserts, *inter alia*, that the Arbitrator disregarded substantive law and the terms of the Company's Operating Agreement (the "Operating Agreement") in the Award by: (1) improperly allowing Mullins to withdraw \$100,000 of his capital contribution to the Company; and (2) incorrectly deeming the Company's forgiven Paycheck Protection Program ("PPP") loans to be outside of the Operating Agreement's distribution provisions. See *id.* Respondent also argues, *inter alia*, that the Arbitrator committed misconduct by ignoring

evidence presented at the Hearing and by refusing to determine the propriety of the Company's member withdrawals. See *id.* at pp. 12-21. In particular, respondent asserts that the Arbitrator committed misconduct by ignoring evidence concerning: (1) certain "work in progress" receipts that had been collected by Mullins but were not deposited into the Company's accounts; and (2) Mullins' and respondent's respective "pre-split" withdrawals and expenditures, which should have been made subject to an accounting. See *id.*

Petitioners opposed the cross-motion, contending that the Award should be confirmed pursuant to CPLR § 7510 and that respondent, who is merely unhappy with the substantive result in the Award, has provided no valid basis for vacating the Award or denying its confirmation. See NYSCEF Doc. No. 85. Specifically, petitioners assert that the Arbitrator heard multiple days of testimony from both parties, including expert witness testimony, received into evidence documents offered by the parties, and solicited post-hearing briefs and additional submissions before issuing the detailed and well-reasoned Award, which included express credibility determinations concerning the parties' testimony and expert witness accounts, all of which supported the Arbitrator's conclusions. See *id.* Petitioners further argue that respondent has not met the heavy burden

required to warrant vacatur of the Award simply because respondent is displeased that the Arbitrator credited Mullins' testimony and found respondent's evidence to be "insufficient," "unclear and at times inconsistent," and not "supported by the record." See *id.* Petitioners also contend that the Arbitrator in the Award did not disregard substantive law or the terms of the Operating Agreement, and nor did the Arbitrator ignore any relevant evidence as asserted by respondent; and that as such the Award should be confirmed pursuant to CPLR § 7510 and respondent's cross-motion should be denied in its entirety. See *id.* at pp. 7-11.

ANALYSIS

It is well-settled that "judicial review of arbitration awards is extremely limited." *Matter of CEO Bus. Brokers, Inc. v 1431 Utica Ave. Corp.*, 187 AD3d 1185, 1186 (2d Dept 2020), citing *Matter of Piller v Eisner*, 173 AD3d 1035, 1036 (2d Dept 2019). As such, "an arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached." *Matter of Rose Castle Redevelopment II, LLC v Franklin Realty Corp.*, 184 AD3d 230, 234 (1st Dept 2020), quoting *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 (2006).

As the Appellate Division, Second Department, further explained in *Matter of CEO Bus. Brokers, Inc.*:

A party seeking to overturn an arbitration award on one or more grounds stated in CPLR 7511(b)(1) bears a heavy burden, and must establish a ground for vacatur by clear and convincing evidence. An arbitration award may be vacated on the ground that the arbitrator exceeded his or her power where the award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. An award is irrational only where there is no proof whatever to justify the award. In addition, pursuant to CPLR 7511(b)(1)(i), an arbitration award may be vacated on the ground that the rights of a party were prejudiced by misconduct in procuring the award. *Matter of CEO Bus. Brokers, Inc.*, 187 AD3d at 1186 (internal citations and quotations omitted).

Moreover, "[c]ourts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies." *NYS Correctional Officers & Police Benevolent Ass'n v State*, 94 NY2d 321, 326 (1999). "A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one." *NYS Correctional Officers*, 94 NY2d at 326. "Indeed, 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." *Id.* As such, "[a]n arbitrator's award will be

confirmed "if any plausible basis exists for the award." *Azrielant v Azrielant*, 301 AD2d 269, 275 (1st Dept 2002), quoting *Graniteville Co. v First Nat'l Trading Co.*, 179 AD2d 467, 469 (1st Dept 1992).

Having reviewed the parties' respective submissions on both motions, *i.e.*, petitioners' motion to confirm the Award and respondent's cross-motion to vacate the Award and dismiss the Petition, the Court determines that the Arbitrator in issuing the Award neither exceeded his power nor imperfectly executed it. Rather, the Record before the Court reflects that respondent simply disagrees with the conclusions made by the Arbitrator, and respondent has not met the "heavy burden" that is required to establish vacatur. *See Matter of CEO Bus. Brokers, Inc.*, 187 AD3d at 1186; *see also Matter of City of Yonkers v Police Benevolent Assn. of the City of Yonkers*, 2022 N.Y. App. Div. LEXIS 6131, **3-4 (2d Dept Nov. 9, 2022) (stating that "[t]he burden is on the movant to establish grounds for vacatur by clear and convincing evidence" and holding that "the Supreme Court properly granted the respondent's motion to confirm the arbitration award and denied the petitioner's cross motion to vacate the arbitration award"); *Matter of J-K Apparel Sales Co., Inc. v Esposito*, 189 AD3d 1045, 1046 (2d Dept 2022) (noting that "[a] party seeking to overturn an arbitration award

bears a heavy burden and must establish a ground for vacatur by clear and convincing evidence" and holding that the respondent "failed to show by clear and convincing evidence a basis for vacating the arbitration award pursuant to CPLR 7511"); *Matter of Board of Educ. of the Yonkers City Sch. Dist. v Yonkers Fedn. of Teachers*, 185 AD3d 811, 812 (2d Dept 2020) ("agree[ing] with the Supreme Court's determination that the arbitrator's award was neither irrational nor violative of public policy, and that the arbitrator did not exceed a specifically enumerated limitation on his authority").

The Court does not credit respondent's argument that the Arbitrator disregarded substantive law and the terms of the Operating Agreement in the Award. Rather, the Record reflects that in the Interim Award dated August 8, 2022 that was expressly incorporated into the Award, the Arbitrator considered and rejected: (1) respondent's contention that Mullins had improperly withdrawn \$100,000 from the Company, based upon the terms of the Operating Agreement; and (2) respondent's assertion that he should have been entitled to share in the Company's forgiven PPP loans. See NYSCEF Doc. No. 3 at ¶¶ 33; 38-50; 60-63; NYSCEF Doc. No. 19 at ¶ 1. Nor does the Court credit respondent's contention that the Arbitrator purportedly committed misconduct by ignoring evidence presented at the

Hearing and by refusing to determine the propriety of the Company's member withdrawals. By contrast, the Record is clear that the Arbitrator duly considered, and rejected, respondent's assertions that: (1) respondent should have been entitled to compensation for certain "work in progress"; and (2) the parties' respective "pre-split" withdrawals and expenditures should have been made subject to an accounting. See NYSCEF Doc. No. 3 at ¶¶ 31-36; 56-59; NYSCEF Doc. No. 19 at ¶ 1.

Indeed, despite respondent's unsupported claims that the Arbitrator "ignored" certain evidence, it is apparent that the Arbitrator properly considered evidence where, as here, "the arbitration award itself states that the arbitrator considered the [party's] submissions, which included the very evidence that the [party] claims was not considered." *Matter of Allstate Ins. Co. v GEICO*, 100 AD3d 878, 879 (2d Dept 2012) (stating that "there is no indication in the record that the arbitrator refused to consider pertinent material evidence" and holding that "the Supreme Court erred in granting the petition to vacate the arbitration award").

Accordingly, for the reasons set forth above, the Court grants petitioners' motion (seq. no. 1) to confirm the Award pursuant to CPLR § 7510, and denies respondent's cross-motion (seq. no. 2) to vacate the Award and to dismiss the Petition.

See *Matter of City of Yonkers*, 2022 N.Y. App. Div. LEXIS 6131 at **3-4 (holding that “the Supreme Court properly granted the respondent’s motion to confirm the arbitration award and denied the petitioner’s cross motion to vacate the arbitration award”); *Matter of J-K Apparel Sales Co., Inc.*, 189 AD3d at 1046 (finding that the respondent “failed to show by clear and convincing evidence a basis for vacating the arbitration award pursuant to CPLR 7511. Accordingly, the Supreme Court should have granted the petition to confirm the arbitration award”); *Matter of CEO Bus. Brokers, Inc.*, 187 AD3d at 1186 (affirming “the Supreme Court’s determination granting the petition to confirm the arbitration award and denying the [respondents’] cross motion to vacate the award”).

The foregoing constitutes the decision and order of the Court.¹

Dated: White Plains, New York
November 21, 2022



HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Slarskey LLC
Attorneys for Petitioners
420 Lexington Avenue, Suite 2525
New York, New York 10170

¹ All other arguments raised on these two motions and all materials submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

Wasserman Grubin & Rogers, LLP
Attorneys for Respondent
1700 Broadway, 16th Floor
New York, New York 10019