

Elkay Plastics Co., Inc. v Astzen Group LLC
2023 NY Slip Op 30162(U)
January 17, 2023
Supreme Court, New York County
Docket Number: Index No. 652784/2022
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE

PART

60M

Justice-----X
ELKAY PLASTICS CO., INC.,

Plaintiff,

- v -

ASTZEN GROUP LLC, BRYAN A. MCKENNA

Defendant.
-----XINDEX NO. 652784/2022MOTION DATE N/AMOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 23, 24, 25
were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

Introduction

This dispute arises from several arbitration awards and interim awards that were issued in the matter of *Elkay Plastics Co., Inc. v. AstZen Group LLC and Bryan A. McKenna, Esq.* (AAA Case No. 01-21-0004-8037) (the “Arbitration Proceeding”), involving petitioner Elkay Plastics Co., Inc. (“Elkay”), and respondents AstZen Group LLC (“AstZen”) and Bryan A. McKenna, Esq. (“McKenna”).

Background

Elkay entered into two agreements with AstZen to purchase PPE gloves in 2021. In connection with those agreements, Elkay deposited more than \$4.5 million into an escrow account administered by McKenna. After AstZen breached the agreements, Elkay sought to have the escrowed funds returned. McKenna failed to return those funds, however, and Elkay commenced the underlying arbitration.

During the course of the arbitration, McKenna failed to comply with the arbitrator’s various discovery directives and orders, including the first interim order (*see* NYSCEF Doc No 6 [second interim award, with first interim order annexed]). As a result, the arbitrator ordered McKenna to produce the outstanding documents or the arbitrator would award petitioner \$10,000 in attorneys’ fees for each week that McKenna continued to flout the discovery directives (Second Interim Award at 17). The arbitrator capped that conditional award at \$30,000 [\$10,000 per week for up to three weeks, spanning from 3/10/22 to 3/21/22]. McKenna again failed to comply.

The arbitrator issued the Final Award (NYSCEF Doc. No. 8 [final award]) on 7/25/22 after an evidentiary hearing. In the Final Award, petitioner was awarded:

a. Payments from McKenna to Elkay:

- i. \$4,501,400 to Elkay from the client escrow account McKenna administered;
- ii. \$30,000 to Elkay for attorneys' fees pursuant to the Second Interim Award; and
- iii. \$26,736.67 to Elkay as reimbursement for arbitration fees and costs.

b. Payments from AstZen to Elkay:

- i. \$69,308.53 as liquidated damages and prejudgment-interest relating to AstZen's non-performance of its contractual obligations; and
- ii. \$26,736.67 as reimbursement for arbitration costs and fees.

(NYSCEF Doc 6 [second interim award] at 5; NYSCEF Doc 8 [final award] at 18).

Now, in its 8/1/22 petition (NYSCEF Doc. No. 1), Elkay moves to confirm the second interim award and final award. It also seeks costs incurred in this case, pre-judgment interest, and post-judgment interest. Respondent AstZen has not appeared in this special proceeding or opposed this motion. However, McKenna, who did not answer the petition, opposes the petition solely as it relates to the arbitrator's award of \$30,000 against him for attorneys' fees. McKenna argues that the arbitrator exceeded his authority because the \$30,000 award constitutes impermissible punitive damages (NYSCEF Doc 23 [McKenna affirmation in opposition]).

The petition to confirm the award is granted as to AstZen. AstZen did not interpose opposition, has not appeared, and the final award appears fair and reasonable. As to McKenna, his arguments in opposition to the petition are unavailing. First, his affirmation in opposition is defective. McKenna is a party respondent in this case, but his "affirmation" is not notarized.

The court also rejects McKenna's argument that the arbitrator exceeded his authority by awarding petitioner punitive damages in the second interim award. The second interim award plainly awarded petitioner attorneys' fees, in the amount of \$10,000 per week for up to three weeks, for McKenna's continued failure to comply with his discovery obligations.

The arbitrator had the authority to award petitioner reasonable attorneys' fees and costs incurred as a result of McKenna's noncompliance (*see e.g. Vitra, Inc. v Ninety-Five Madison Co., L.P.*, 2020 NY Slip Op 32389[U], *9 [Sup Ct, NY County 2020] [finding an award of sanctions was warranted under analogous JAMS Rules]). Here, under AAA Commercial Rule R-22(a): "[t]he Arbitrator shall manage any necessary exchange of information among the parties . . . while . . . promoting equality of treatment and safeguarding each party's opportunity to fairly present its

claims and defenses” (AAA Commercial Rules, R-22[a]). Further, under Rule R-23(d), the arbitrator has the authority to make a special allocation of costs for a party’s willful non-compliance with disclosure obligations (AAA Commercial Rules, R-23[d]; *see also* AAA Commercial Rules, R-58 [authorizing arbitrator to impose appropriate sanctions for a party’s failure to comply with the AAA Rules and the arbitrator’s orders]). The cases McKenna cites in opposition are inapplicable.

The arbitrator’s \$30,000 award of attorneys’ fees as a discovery sanction for failure to comply with the AAA Rules and the first interim order is also supported by the underlying record. The fees were awarded after six unsuccessful attempts to compel McKenna’s compliance with the arbitrator’s ordered production of the escrow account statements.

Finally, the court also rejects McKenna’s argument that he was not a proper party to the arbitration proceeding. The Arbitrator properly found that there was jurisdiction over McKenna, McKenna never timely objected to the Arbitrator’s jurisdiction, and McKenna appeared and consented to jurisdiction by participating in the Arbitration (*see* First Interim Order at 15).

Because McKenna has not identified a single basis under CPLR 7511 to vacate the arbitration awards, the court must confirm the second interim award and the final award (CPLR 7510; *Granet & Assoc., Inc. v Thom Filicia, Inc.*, 159 AD3d 573, 573 [1st Dept 2018]).

The court has considered the parties’ remaining contentions and finds them unavailing.

Accordingly, it is

ADJUDGED that the petition is granted and the second interim award [dated April 26, 2022] and final award [dated July 25, 2022] rendered in favor of petitioner and against respondents is confirmed; and it is further

ORDERED and ADJUDGED that petitioner is entitled to pre-judgment interest from July 25, 2022 at the statutory rate, post-judgment interest at the statutory rate, and costs as calculated by the Clerk of the Court; and it is further

ORDERED that petitioner submit a proposed judgment within 10 days of the date of this decision, order, and judgment confirming the second interim award and final award.

1/17/2023

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE


MELISSA A. CRANE, J.S.C.