

Matter of Barthley v New York City Tr. Auth.
2012 NY Slip Op 33668(U)
January 31, 2012
Supreme Court, Bronx County
Docket Number: 260655/11
Judge: Brigantti-Hughes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

In the Matter of the Application of KEITHLEY
BARTHLEY,

DECISION/ORDER

Petitioner,

-against-

Index No.:260655/11

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

X

The following papers numbered 1 to read on the below motions noticed on **August 15, 2011** and **October 13, 2011** and duly submitted on the Part IA15 Motion calendar of **November 28, 2011**:

<u>Papers Submitted</u>	<u>Numbered</u>
Pet. Order to Show Cause, Affirmation, exhibits	1,2,3
Resp. Affirmation in support of Cross-Motion, exhibits	3,4
Pet. Affirmaiton in support of Cross-Motion to Amend, exhibits	5,6
Resp. Affirmation in opposition to Cross-Motion, exhibits	7,8
Pet. Notice of Motion to Change Venue, exhibits	9,10

By way of Order to Show Cause, claimant Keithley Barthley (hereinafter "Petitioner") petitions for an Order vacating a May 16, 2011 arbitration award. Respondent New York City Transit Authority ("Respondent") cross-moves to dismiss the petition pursuant to CPLR 3211(a)(5) and (7) and CPLR 7511. Also before the court are motions filed by Petitioner to change venue and transfer the case to New York County, and to amend his original filings.

The instant petition and cross-motion to dismiss were originally set for an appearance date of September 12, 2011. The parties stipulated to adjourn the hearing to October 12, 2011. A portion of Respondent's original cross-motion to dismiss was based on improper venue. When the parties appeared before the court on October 12, 2011, counsel for Petitioner indicated that she had filed a motion to change venue. In response, Respondent orally waived the portion of its

cross-motion based on improper venue. The parties subsequently worked out a schedule to grant Petitioner time to respond to the cross-motion, and allow Respondent to reply to the opposition. The instant petition and cross-motion were thereafter adjourned via stipulation to November 28, 2011. The stipulation provided that (1) Respondent would withdraw the portion of his cross-motion as it pertained to venue, (2) Petitioner shall respond to Respondent's cross-motion to dismiss the petition by October 26, 2011, (3) Respondent's reply shall be due on or by November 2, 2011, and (4) the motion is returnable November 28, 2011. In light of the stipulation, Petitioner's cross-motion to change venue is disregarded as moot, since the alleged deficiency was resolved at the October 12, 2011 appearance before the court.

Since entering the above-noted stipulation, Petitioner opposed Respondent's cross-motion to dismiss by filing another cross-motion to amend the pleadings. In that cross-motion, Petitioner opposes Respondent's initial arguments that his petition was procedurally defective. In the alternative, the cross-motion seeks leave to file an amended petition in accordance with CPLR 3025(b) and 2001. In the interest of judicial economy, the above motions and cross-motions are hereby consolidated and disposed of in the following Decision and Order.

I. Factual History

An impartial arbitrator rendered an award which resulted in Petitioner's dismissal from employment as a bus operator for Respondent. The relevant facts are as follows: On March 2, 2011, Petitioner was employed as a bus operator assigned to the Manhattanville Depot line. On that date, in the early afternoon, a female customer carrying bags ("Ross") and two other females boarded the bus. Two of the three females paid the bus fare upon boarding. Ross did not, and did not advise the bus operator that she would come back to pay the fare. Petitioner questioned one of the females about Ross' unpaid fare, to which she responded that Ross was looking for change. The bus was stopped at the time, as there was fire department activity at 180th Street and St. Nicholas Avenue. Ross then asked Petitioner for his badge number, as she wished to make a complaint about him. Petitioner told Ross that he did not give her any problem, but that if she needed to make a complaint, she could write down the bus number and utilize it in making the complaint. Petitioner's badge number was not displayed in its customary position because he

had used the key attached to it to operate the wheelchair lift. Ross thereafter informed Petitioner that she would take his photograph for the complaint. Ross allegedly placed her cell phone in front of Petitioner while the bus was in motion to try and take the photo. Petitioner told her to stay behind the white bus line, and asked her not to put things in his face while he was driving. Later on, Ross tried to take Petitioner's photograph again. Petitioner allegedly pushed the cell phone away from his face, causing it to fall to the floor of the bus. Petitioner alleges he did not make contact with Ross, only the cell phone.

Petitioner made a notation about the incident on his trip sheet for the day. Ross made a report of the incident, alleging that, in part, Petitioner's attempt to knock her cell phone out of her hand caused her lip to burst. She alleged that he swung his right hand at her with a closed fist, knocking her phone out of her hand and striking her face. Petitioner then left the bus, pushing her away from the front door. Ross went on to report the incident to the New York Police Department.

Respondent conducted an internal investigation, which involved interviews with Petitioner and Ross. Petitioner was ultimately placed out of work until further notice. Thereafter, a Disciplinary Action Notification was filed outlining charges against Petitioner. Petitioner filed a grievance, and on April 12, 2011 and May 10, 2011, Petitioner and Respondent appeared for arbitration hearings regarding the charges.

Petitioner and Ross were the only eye witnesses who testified. There is no transcript of the proceedings. In an Opinion and Award, the arbitrator concluded that Respondents' termination of Petitioner was proper. She found that Ross' version of events was more credible than Petitioner's. Further, Petitioner admitted "critical facts" that also supported the charges, as he admitted he refused to disclose his badge number upon request, and admitted that he pushed Ross' cell phone from her hands. Ross' injury to her lip was confirmed at the hearing by observations of Transit Authority witnesses and pictures taken that afternoon. Even if Petitioner did not intend to cause injury, the conduct could not be excused. The arbitrator reasoned that Petitioner "was required to demonstrate greater restraint in dealing with customers, 'even under the greatest provocation,'" citing Rule 10(d). Moreover, Petitioner failed to notify the dispatcher of the incident upon conclusion of his shift. Ultimately, the arbitrator found termination to be

appropriate, and denied Petitioner's grievance.

Petitioner now moves pursuant to CPLR 7511 to vacate the arbitration award.

II. Analysis

Petitioner argues that the award should be vacated because the arbitrator failed to apply proper governing law, and that law was well-defined, explicit, and clearly applicable to this case. He argues that the decision is "arbitrary and capricious" because there was no evidence, besides the parties' testimony, that Ross was even injured. He argues that Ross had "serious credibility issues" and therefore it was unreasonable for the arbitrator to consider her testimony valid. Petitioner also makes the conclusive assertion that the decision "violates strong public policy" and "clearly exceeds a specifically enumerated limitation on the arbitrator's power."

Respondent initially argues that the alleged petition is deficient as it was improperly commenced. Under CPLR 304, a special proceeding is "commenced by filing a notice of petition or order to show cause and a petition." CPLR 2001 provides that at any stage of an action, including the filing of a petition to commence an action, the court may permit a mistake, omission, defect or irregularity to be corrected if a substantial right of a party is not prejudiced. The Court of Appeals has held that, in deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant – notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Ruffin v. Lion Corp.*, 15 N.Y.3d 578 (2010). In *Goldberg v. Westchester County Health Care Corp.*, for example, the Court held that CPLR 2001 could not excuse a complete failure to file within the statute of limitations, where the plaintiff only filed permission to file a late notice of claim, and never filed a timely summons and complaint. 16 N.Y.3d 323 (2011).

In this matter, Petitioner filed and served an Order to Show Cause with an Affidavit of Merit from the claimant, which apprised Respondent of the pendency of the action and afforded them the opportunity to respond. There has been no showing of prejudice with respect to Respondents' substantial rights, in responding to the special proceeding. Accordingly, Petitioner's cross-motion to amend and file a verified petition will be granted, and the petition

will be considered on its merits.

It is well settled that the scope of judicial review of an arbitration proceeding (see CPLR 7511[b], [c]) is extremely limited. *Frankel v. Sardis*, 76 A.D.3d 136 (1st Dept. 2010), citing *Matter of Silverman (Benmor Coats)*, 61 N.Y.2d 299 (1984); *Azrielant v. Azrielant*, 301 A.D.2d 269, 752 N.Y.S.2d 19 (1st Dept. 2002), *lv. denied* 99 N.Y.2d 509 (2003). Indeed, “[c]ourts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined.” *Matter of Goldfinger v. Lisker*, 68 N.Y.2d 225, 230 (1986); *see also Kern v. Krackow*, 309 A.D.2d 650 (1st Dept. 2003), *lv. denied* 1 N.Y.3d 505 (2004) (judicial intervention would contravene strong public policy of this State in favor of resolving disputes in arbitration as a means of conserving scarce judicial resources). An award will not be overturned “unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power.” *Silverman, supra*, 61 N.Y.2d at 308.

Further, an arbitrator is not bound by principles of substantive law or by rules of evidence,” but “may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them...” *Henneberry v. ING Capital Advisors, LLC*, 37 A.D.3d 353 (1st Dept. 2007), citing *Matter of Silverman, supra*. Importantly, as stated in *Lackow v. Department of Education of City of NY*, 51 AD3d at 568 (1st Dept. 2008), “[a] hearing officer's determinations of credibility, however, are largely unreviewable because the hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures—all the nuances of speech and manner that combine to form an impression of either candor or deception.”

In this matter, Petitioner asserts that “the conclusion drawn by the arbitrator is not a reasonable one given the serious credibility issues surrounding Ms. Ross’ testimony.” Petitioner goes on to detail alleged inconsistencies in Ms. Ross’ account of the incident, when compared to Petitioner’s recollection of the incident. As stated above, however, credibility issues are largely unreviewable. *Lackow, supra*. There is likewise no evidence to support Petitioner’s assertion that the arbitrator committed misconduct in believing Ms. Ross’ account. Petitioner also failed to demonstrate that the award confirming termination of his employment was “violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power.” *Matter of Silverman, supra*. Petitioner only makes conclusive

assertions that the award was improper.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Petitioner's motion to amend the pleading is granted to the extent that his attached Verified Petition is deemed valid and filed, and it is further,

ORDERED, that the Verified Petition to vacate the arbitration award is denied, and it is further,

ORDERED, that Respondent's cross-motion to dismiss the Verified Petition and confirm the arbitration award is granted, and it is further,

ORDERED, that Petitioner's cross-motion to change venue is denied as moot.

The above constitutes the Decision and Order of this Court.

Dated: January 31, 2012



Hon. Mary Ann Brigantti-Hughes, J.S.C.