

**Matter of Estate of Katz v Michael Cohn Asian Art,
LLC**

2012 NY Slip Op 33875(U)

February 10, 2012

Supreme Court, New York County

Docket Number: 652490/2011

Judge: Carol R. Edmead

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

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In the Matter of the Application of

Richard M. Lipsman, as Executor of
the Estate of Wallace Katz, Deceased

Petitioner,

Index
Number:

-against-

652490/2011

Michael Cohn Asian Art, LLC
and Michael Cohn,

Respondents.

-----X
Carol R. Ednead, J:

Petitioner seeks to set aside the portion of an arbitration award (the Award), dated August 18, 2011, that awarded attorneys' fees, contending that it exceeded the arbitrator's authority and that the arbitrator's conduct in limiting evidence constituted misconduct. Respondents cross-move to confirm the Award in its entirety. The petition and the cross motion are consolidated for disposition and decided as noted below.

Background and Procedural History

Petitioner is the executor of the estate of Wallace Katz (the Decedent) and, as part of his duties in administering the Decedent's estate, he needed to ascertain the value of Decedent's art collection (petition, ¶¶ 1, 3-4). Therefore, he hired respondents to perform the art appraisal, pursuant to a written contract (the Contract) (*id.*, ¶¶ 5-6; Exhibit 2).

The Contract contained the following provision (the

Arbitration Provision):

"Any controversy or claim arising out of, or relating to this contract, or breach hereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and judgment on the award rendered by the Arbitrator[s] may be entered in any Court having the jurisdiction thereof. In the event that a suit is instituted to collect money due under this agreement the client agrees to pay an additional sum for attorney fees and cost of collection, as the court may deem reasonable. New York Law will apply should there be any dispute."

Petitioner contends that respondents failed to perform adequately under the Contract and, ultimately, he discharged them (petition, ¶¶ 9-11). Respondents filed for arbitration, pursuant to the Contract's Arbitration Provision, seeking \$3300.00 in time charges for work performed (the Contract Claim) and attorneys' fees (the Attorneys' Fees Claim) and petitioner contested both claims (*id.*, ¶¶ 13, 15).

The arbitrator permitted each side one main written submission and one rebuttal submission and closed the hearing on August 2, 2011 (*id.*, ¶¶ 16, 18; Exhibit 6). On August 9, 2011, the arbitrator reopened the hearing "for the purpose of allowing Counsel to submit Affidavits for attorney's [sic] fees by August 16, 2011 [and stating that] [t]here shall be no replies and the hearing will be closed upon receipt of the Affidavits." (petition, ¶ 19; Exhibit 7).

On August 16, respondents submitted an affidavit of attorneys' fees, seeking \$38,158.06 (exhibit 9) and petitioner did not respond (petition, ¶ 21). On August 18, 2011, the arbitrator issued the Award, finding for respondent on the Contract Claim in the amount of \$3300.00, plus interest at the rate of one percent per month, commencing September 25, 2010, and finding for respondents on the Attorneys' Fees Claim, in the amount of \$37,427.00. and denying petitioner's counterclaim (*id.*, ¶ 22).

Petitioner contends that the portion of the Award on the Attorneys' Fees Claim exceeds the arbitrator's authority under the Arbitration Provision, violates New York law and that the arbitrator committed misconduct by purportedly allowing only respondents to submit affidavits on attorneys' fees.

Respondents contend that the Attorneys' Fees Claim was within the scope of the Arbitration Provision and that petitioner's claim of misconduct by the arbitrator fails because petitioner did not object to the arbitrator's reopening of the hearing and receipt of their affidavit until after the arbitrator issued the Award (response, ¶¶ 17, 23).

Initially, the court notes that petitioner did not seek to set aside the portion of the Award on the Contract Claim and, consequently, this portion of the Award is confirmed without objection.

Arbitration

"[J]udicial review of arbitration awards is extremely limited [and] ... an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479, cert dismissed 548 US 940 [2006]). Rather, "'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 to be'" (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [1st Dept 2004] quoting, *Azrielant v Azrielant*, 301 AD2d 269, 275 [1st Dept 2002] *lv denied* 99 NY2d 509 [2003] quoting *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]).

Moreover, where "'an arbitrator [is] charged with the interpretation and application of [an] agreement ... [in] [her interpretation of the] agreement, 'an excess of power occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power'" (*Matter of Henneberry v ING Capital Advisors, LLC*, 10 NY3d 278, 284 rearg. denied, 10 NY3d 892 [2008] [internal citation omitted]). Finally, "'courts are obligated to give deference to the decision of the arbitrator'" (*id.* at 284) [citation omitted].

Attorneys' Fees

Generally, "attorneys' fees may not be awarded in arbitration absent provision therefor in a statute or the agreement to arbitrate, or if requested by the parties during the arbitration process" (*Matter of Matza v Oshman, Helfenstein & Matza*, 33 AD3d 493, 494 [1st Dept 2006]; *Myron Assoc. v Obstfeld*, 224 AD2d 504 [2d Dept], *lv denied* 88 NY2d 807 [1996]). This is in accord with the general rule "that parties are responsible for their own attorneys' fees" (*Matza*, 33 AD3d at 495; *Matter of Stewart Tabori & Chang [Stewart]*, 282 AD2d 385 [1st Dept], *lv denied* 96 NY2d 718 [2001]).

Analysis

Petitioner seeks to apply the general rule that parties are responsible for their own attorneys' fees and points to language in the Arbitration Provision that if "a suit is instituted ... the client agrees to pay ... attorney fees ... as the court may deem reasonable" (emphasis added). He asserts that this contractual language indicates that the Attorneys' Fees Claim was not cognizable before the arbitrator. However, "the 'arbitrator's interpretation of the parties' contract is impervious to judicial challenge even where the apparent, or even plain, meaning of the words of the contract has been disregarded'" (*Szabados v Pepsi Cola Bottling Co. of N. Y.*, 191 AD2d 367, 367-368 [1st Dept 1993]) [citation omitted].

In this matter, the Contract contained an Arbitration

Provision, which was broad referring to "any controversy arising out of, or relating to [it]" to arbitration. Since "interpretation and application" of the Contract is a matter for the arbitrator, petitioner's argument would fail "to give deference" to the arbitrator's decision (*Henneberry*, 10 NY3d at 284). In essence, the arbitrator was interpreting the meaning of the Arbitration Provision's terms as to what a suit to collect meant. This contract interpretation is for the arbitrator (*Silverman*, 61 NY2d at 307; *Szabados*, 191 AD2d at 367-368). The portion of the petition that seeks to set aside the portion of the Award on the Attorneys' Fees Claim on the basis that it exceeded the arbitrator's authority is, therefore, denied.

Alleged Arbitrator Misconduct

Petitioner also seeks to set aside the portion of the Award on the Attorneys' Fees Claim based upon a claim that the arbitrator improperly reopened the hearing and only allowed affidavits on attorneys' fees, without permitting a response. However, petitioner does not contest that it did not object to this purported error prior to issuance of the Award (Reply Memorandum, at 5). Petitioner could have submitted an affidavit contesting the amount of or the reasonability of respondents' attorneys' fees. He could also have submitted an affidavit objecting to the reopening of the hearing for the purpose of considering this evidence. "A party who fails to object to an

arbitrator's alleged misconduct until after an adverse ruling 'effectively waives' his right to object" (*Brooks v BDO Seidman, LLP*, 31 Misc 3d 653, 659 [Sup Ct, NY County 2011]). Therefore, the portion of petitioner's application to set aside the portion of the Award on the Attorneys' Fees Claim upon this basis is denied. Respondents' cross motion to confirm the Award is granted.

Order

It is, therefore,

ORDERED that the petition to set aside the portion of the Award of the arbitrator dated August 18, 2011 that awarded respondents attorneys' fees in the amount of \$37,427.00 is denied; and it is further

ORDERED that respondents' cross motion to confirm said Award is granted; and it is further

ADJUDGED that the said Award rendered in favor of respondents and against petitioner is confirmed; and it is further

ADJUDGED that respondents Michael Cohn Asian Art, LLC and Michael Cohn, having an address at 24 East 11th Street, New York, New York 10003, do recover from petitioner Richard M. Lipsman, as executor of the Estate of Wallace Katz, Deceased, having an address at 90 Park Avenue, New York, New York 10016, the amount of \$3300.00, with interest thereon at the rate of one percent per month from the date of September 25, 2010, as computed by the Clerk in the amount of \$_____ and the amount of \$37,427.00, together with costs and disbursement as taxed by the Clerk for the total sum of \$_____, and that the respondents have execution therefor.

Dated: February 10, 2012



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMED