SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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RICHARD S. BERK, D.D.S.

Plaintiff,

-against-

RICHARD S. BERK, D.D.S., ALLAN B. KLEIN, D.D.S. P.C. and KARYN L. KLEIN, as Executor of the Estate of ALLAN B. KLEIN, deceased,

Defendants.

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DCM Part 4

Present:

HON. JOHN A. FUSCO

DECISION AND ORDER

Index No. 102097/11

Motion Nos. 826-003
1218-004

The following papers numbered 1 to 3 were marked fully submitted this 27th day of April, 2012:

	Papers Numbered
Notice of Motion for an Order Pursuant to CPLR Article 75 Confirming an Arbitration Award (Affirmation in Support)	1
Notice of Counter Motion to Vacate the Arbitration Award (Affirmation in Support)	2
Reply	3

Upon the foregoing papers, the motion (No. 826-003) of defendant Karyn L. Klein, as Executor of the Estate of Allan B. Klein, deceased (hereinafter "Klein"), to confirm the March 5, 2012 arbitration award on the Estate's entitlement to collect disability and retirement benefits on decedent's behalf, and for the entry of judgment thereon is granted; the "counter" motion (No. 1218-004) of plaintiff, Richard S. Berk, DDS (hereinafter "Dr. Berk"), for an order vacating and/or modifying said award is denied.

BERK v BERK, et al.

This matter arises out of a dispute between two oral surgeons, Drs. Berk and Klein (now deceased), who were partners of long-standing under the terms of an "Employment Contract" and "Stockholder Agreement" dated December 19, 1988 (*see* Klein's Exhibits A, B). In November of 2009, Dr. Klein was diagnosed with and began treatments for prostate cancer. It is undisputed that from January of 2010 through April of 2011 he was paid full salary along with monthly disability insurance payments. On January 17, 2011, Dr. Klein collapsed in the office. He passed away three months later. For his part, Dr. Berk claims that he was unaware, until discovery was exchanged in a nascent arbitration proceeding, that Dr. Klein had been receiving both salary and disability payments during the preceding 16 months. Rather, he maintains that he was concerned solely with keeping the practice going, and did not realize either the gravity of Dr. Klein's physical condition or that he was receiving the dual payments.

On June 16, 2010, prior to Dr. Klein's passing and for reasons unrelated to his associate's illness, Dr. Berk hand delivered a letter of intention to retire from the practice to Dr. Klein, which the latter allegedly rejected on the basis of his being within a "disability period" as provided in the parties' contract (*see* October 13, 2011 Arbitration Transcript, pp 47 - 49; Berk's Exhibit

F). Both parties retained counsel in an unsuccessful effort to reach a workable agreement regarding Dr. Berk's intention to retire (*see* March 5, 2012 "Award of Arbitrator", pp 13 - 14).

Following the failure to resolve this issue, Dr. Klein filed a demand for arbitration in March 2011, seeking "an accounting of disability and retirement payments of not less than ONE MILLION DOLLARS ($1,000,000.00)" under the terms of his agreement with Dr. Berk (*see* "Rider" to Demand for Arbitration, Klein's Exhibit D[2]). As a result, Dr. Berk commenced this action for damages in the amount of $275,000.00.[1]

Following the eventual denial of Dr. Berk's motion to stay arbitration, the Klein matter proceeded to arbitration before AAA arbitrator Jack P. Levin, Esq., who conducted a hearing on October 21, 2011. In the ensuing decision, the arbitrator awarded the Klein estate the sum of $630,663.90, which, in accordance with the terms of paragraph 11 of the parties' Employment Contract, was directed to be paid in 60 equal monthly installments commencing on April 1, 2012.

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[1]In this action, Dr. Berk alleges that he is owed the book value of the stock in the business and other compensation as a result of his in-hand delivery of his written notice of intention to retire on June 16, 2010. Dr. Klein lost his fight against prostate cancer in April of 2011, whereupon his estate was substituted as a party-defendant.

The Klein Estate subsequently moved to confirm the award pursuant to CPLR 7510, whereupon Dr. Berk "counter"-moved for vacatur on (1) public policy grounds, (2) purported partiality on the part of the arbitrator, (3) fraud, (4) misconduct, and (5) the questionable rationale underlying the award. Alternatively, Dr. Berk sought modification of the award pursuant to CPLR 7511(c) claiming that the arbitrator miscalculated and/or erred in the description of the property referred to in the award. Dr. Berk further claimed that an elimination of these errors would entitle him to a set-off in his favor in the amount of $568,155.00[2] against the arbitration award.

As set forth previously, the motion to confirm the award is granted, and Dr. Berk's "counter" motion to vacate or modify the award is denied.

There exists in this State a longstanding policy which favors arbitration as an expeditious and economical alternative to the judicial process for the resolution of disputes between consenting parties (*see* Matter of Weinrott [Carp], 32 NY2d 190; *see generally* Matter of Smith Barney Shearson v. Sacharow, 91 NY2d 39, 45-47).

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[2]Berk submits that since the business was terminated on December 31, 2010, the arbitrator was required by the parties' employment agreement to use the calendar years 2009 and 2010 as the 24-month period "immediately preceding said termination" as the basis for his computation, rather than the calendar years 2008 and 2009.

In this regard, New York courts have typically been guided by the fundamental principle that since the resolution of disputes by arbitration is grounded in the assent of the parties (*see* County of Sullivan v. Edward L. Nezelek, Inc., 42 NY2d 123, 128), as a matter of law, arbitration clauses are generally entitled to be given full effect (*see* Matter of Nationwide Gen Ins Co. v. Investors Ins Co 37 NY2d 95; Matter of Weinrott [Carp], 32 NY2d at 198). Further, it has long been held that "even 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" (Matter of Social Serv. Empls. Union, Local 371 v. City of New York, 50 AD3d 264, 265 [*internal quotation marks omitted*]; Azrielant v. Azrielant, 301 AD2d 269, 275). To the contrary, the court is enjoined to uphold the award if it rests on any plausible basis (*id.* at 275; *see* Matter of Campbell v. New York City Tr. Auth., 32 AD3d 350).

Here, it is the opinion of this Court that Arbitrator Levin's sixteen page decision (Klein's Exhibit "B") rests upon an entirely plausible basis, as does his decision to use calendar years 2008 and 2009 as the relevant twenty-four month period described in the parties' agreement (*id.* at p. 10).

While it is true that the court does not "sit as an administrative rubber stamp over an arbitrator's determination"

(Matter of Staklinski [Pyramid Elec Co], 6 NY2d 159, 167), no clear basis exists in this case upon which to predicate the court's exercise of its equitable "latitude of discretion" to vacate or modify the award (*id.*).

Accordingly, it is

ORDERED, that defendant's motion to confirm the arbitration award is granted; and it is further

ORDERED, that the plaintiff's "counter" motion to vacate or modify the award is denied; and it is further

ORDERED, that pursuant to CPLR 7514 the Clerk enter judgment in favor of Karyn L. Klein, as Executor of the Estate of Allan B. Klein, Deceased, in the amount of $630,663.90 to be paid in 60 consecutive and equal monthly installments, with the first installment becoming due on August 1, 2012.

E N T E R,

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Hon. John A. Fusco, J.S.C.

Dated: July 27, 2012