Taborsky v Bayes
2016 NY Slip Op 30307(U)
February 23, 2016
Supreme Court, Suffolk County
Docket Number: 09-9562
Judge: Ralph T. Gazzillo
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[* 1]

SHORT FORM ORDER

INDEX No. 09-9562

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 5/19/14 (#003)
MOTION DATE 7/17/14 (#004)
ADJ. DATE 5/5/15
Mot. Seq. #003 - MotD; CDISPSUBJ
Mot. Seq. #004 - XMD

ROY TABORSKY,

Plaintiff,

- against -

LAWRENCE BAYES and PAULA BAYES,

Defendants.

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Upon the following papers numbered 1 to ___ read on this motion to confirm arbitration award; cross motion to vacate arbitration award; Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers 13-42; Answering Affidavits and supporting papers 43-44; Replying Affidavits and supporting papers 45-46; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 7510, confirming an arbitrator's award dated March 17, 2014 in favor of the plaintiff in the amount of $46,395, directing the entry of judgment pursuant to CPLR 7514, and further directing interest on the judgment pursuant to CPLR 5001 (a) and (b), is granted to the extent of confirming the award and directing the submission of a proposed judgment for signature, and is otherwise denied; and it is further

ORDERED that the cross motion by the defendants for an order pursuant to CPLR 7511, vacating or modifying an arbitrator's award dated March 17, 2014 in favor of the plaintiff in the amount of $46,395, is denied.

This is an action to recover damages arising from the claimed breach of a contract for the performance of certain renovation work at the defendants' residence in Sag Harbor, New York. Pursuant to the parties' contract, "[a]ll claims, disputes and other matters arising out of or relating to this Agreement shall be decided by arbitration."

On June 1, 2009, the parties stipulated to submit to arbitration their respective claims under the contract and, in effect, to stay this action pending arbitration of their dispute.

The matter proceeded to arbitration, with hearings held over a period of two years. The plaintiff claimed that there was a balance on the contract of $68,000 but, after credits to the defendants, he was owed $6,500 under the contract and $92,623 for extra work performed, for a total of $99,123. The defendants claimed that they were entitled to additional credits because the plaintiff never completed the work under the contract. On March 9, 2013, the arbitrator ruled in the plaintiff's favor and awarded him $68,000 under the contract and $30,000 for extra work, for a total of $98,000.

The plaintiff subsequently moved in this action to confirm the March 9, 2013 award, and the defendants cross-moved to vacate or modify the March 9, 2013 award. By order dated November 18, 2013, the court confirmed so much of the award as granted the plaintiff $30,000 for extra work but vacated the remainder, noting that the decision to award the plaintiff $68,000 under the original contract was without a rational basis, as the plaintiff had requested only $6,500. Accordingly, the court remitted the matter to the arbitrator for a new determination as to the amount of damages under the original contract.

Upon remittitur, and after considering the supplemental briefs submitted by the parties, the arbitrator issued an award dated March 17, 2014 finding, in essence, that the plaintiff was entitled to an additional $16,395 (*i.e.*, on top of the $30,000 previously awarded) representing an increase in the contract price due to changes requested by the defendants.

> While it is true that defendant was entitled to "credits" attributable to certain portions of work which defendant chose to change or assume, the cost of such changes were never intended to reduce the value of services performed by plaintiff. (See Exhibit C in Plaintiff's "Supplemental Brief and Summation" previously submitted by plaintiff's attorney.)
>
> It is also noted that defendant's attorney submits a monetary breakdown which is creative but fails to take into consideration the basic facts which support plaintiff's claim. Plaintiff's submission appropriately outlines the "Up-Grades" continuously pursued by defendant which according to plaintiff totaled $49,633.00.
>
> The factual history presented in the case at bar clearly identifies constant changes sought by defendant. Plaintiff's attorneys submission outlines the changes and fixes the amount due at $49,633.00.
>
> To what extent changes requested by defendant constituted an increase in the contract price is the basic issue which should have been addressed. Plaintiff's submission includes in Exhibit C, a five page list of items and the cost of such items which perhaps increased the cost of the work to be performed by plaintiff. However, the purpose of submitting such items is unclear.

> As best determined, plaintiff is entitled to $30,000 representing extras which is clearly owed to plaintiff. In addition, the "Agreed to Items" listed in Exhibit C of plaintiff's submission is $13,335.00 and $3,060.00 totaling $16,395.00 which is also owed to plaintiff. Adding such amounts together, plaintiff is awarded the sum of $46,395.00.

The plaintiff now timely moves in this action to confirm the March 17, 2014 award, and the defendants timely cross-move to vacate or modify the March 17, 2014 award (*see* CPLR 7510, 7511 [a]; ***Matter of Brentnall v Nationwide Mut. Ins. Co.***, 194 AD2d 537, 598 NYS2d 315 [1993]).

Pursuant to CPLR 7510, a court "shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." CPLR 7511 (b) (1) sets forth the exclusive grounds for vacating an award where, as here, the aggrieved party participated in the arbitration:

> (i) corruption, fraud or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
>
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Even if the arbitrator misconstrues or disregards the relevant facts or law, the award will not be vacated "unless it is violative of a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (***Matter of Town of Callicoon [Civil Serv. Empls. Assn., Town of Callicoon Unit]***, 70 NY2d 907, 909, 524 NYS2d 389 [1987]). As such, judicial review of arbitration awards is extremely limited, and courts are obligated to give deference to an arbitrator's decision. "An arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (***Matter of MBNA Am. Bank v Karathanos***, 65 AD3d 688, 883 NYS2d 917, 918 [2009]; *accord* ***Wien & Malkin LLP v Helmsley-Spear, Inc.***, 6 NY3d 471, 813 NYS2d 691, *cert dismissed* 548 US 940, 127 S Ct 34 [2006]). Stated otherwise, an arbitrator "is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be" (***Matter of Erin Constr. & Dev. Co. v Meltzer***, 58 AD3d 729, 730, 873 NYS2d 315, 317 [2009]). By the same reasoning, a party seeking to vacate an award carries a heavy burden (*e.g.* ***Scollar v Cece***, 28 AD3d 317, 812 NYS2d 521 [2006]), "for once the issue is properly before the arbitrator, questions of law and fact are merged in the award and are not within the power of the judiciary to resolve" (***Binghamton Civ. Serv. Forum v City of Binghamton***, 44 NY2d 23, 28, 403 NYS2d 482, 484 [1978]).

Upon review, the court finds no basis for disturbing the award. The defendants' objections are addressed below.

The defendants initially object that in determining that the plaintiff was entitled to an additional $16,395 as damages under the original contract, the arbitrator improperly considered items originally listed as "extras and upgrades" which were included as part of the plaintiff's request for $92,623 for extra work performed. The defendants contend that by breaking out certain of those items as "contract upgrades," the arbitrator effectively allowed the plaintiff "to have a second bite at the same apple." The court finds this objection to be without merit. Whether or not any of those items formed a basis for the original $30,000 award, any question as to the inconsistency or preclusive effect, if any, of a prior arbitration award is a matter within the exclusive province of the arbitrator to resolve, and is not a ground for vacating or modifying a subsequent award (*see* ***Matter of City School Dist. of City of Tonawanda v Tonawanda Educ. Assn.***, 63 NY2d 846, 482 NYS2d 258 [1984]; ***Vilceus v North Riv. Ins. Co.***, 150 AD2d 769, 542 NYS2d 26 [1989]; ***Matter of City of New York v Sanitation Officers Assn. Local 444 S.E.I.U. AFL-CIO***, 13 Misc 3d 1240[A], 831 NYS2d 352 [2006]).

The defendants further contend that the award of $16,395 as additional damages under the original contract was irrational because the plaintiff requested only $1,160. Again, the court is constrained to disagree. While it does appear, as the defendants claim, that the plaintiff seeks to recover as "contract upgrades" only a fraction of the "Agreed to Items" listed in Exhibit C of plaintiff's Supplemental Brief and Summation (subtotaling $16,395), it also appears that the plaintiff submitted as Exhibit D of his Supplemental Brief and Summation a separate list of "Up-Grades to Items Contained in the Original Contract" (totaling $49,633). However dubious the logic employed by the arbitrator, it cannot be said that there is "no proof whatever to justify the award" (***Matter of Local 342 v Town of Huntington***, 52 AD3d 720, 721, 860 NYS2d 607, 608 [2008]).

The defendants' remaining objections–that the arbitrator failed to properly account for credits due and costs of completion, and disregarded their assertion that they overpaid for the plaintiff's work–amount to little more than claims that the arbitrator failed to properly consider the evidence before him and, hence, do not state a valid basis for upsetting the award (*see* ***Matter of Solow Bldg. Co. v Morgan Guar. Trust Co. of N.Y.***, 6 AD3d 356, 776 NYS2d 547, *lv denied* 3 NY3d 605, 785 NYS2d 22 [2004], *cert denied* 543 US 1148, 125 S Ct 1310 [2005]; ***Matter of Nationwide Mut. Ins. Co. v Steiner***, 227 AD2d 563, 643 NYS2d 373 [1996]; ***Matter of Guetta [Raxon Fabrics Corp.]***, 123 AD2d 40, 510 NYS2d 576 [1987]).

Based on the foregoing, the defendants' cross motion to vacate or modify the award is denied. Since the court is mandated to "confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511" (CPLR 7510; *accord* CPLR 7511 [e]), the award is hereby confirmed and the plaintiff is directed to submit a proposed judgment for signature (*see* CPLR 7514; Uniform Rules for Trial Cts [22 NYCRR] § 202.48), and the plaintiff's motion is granted to that extent. As to the remaining relief requested by the plaintiff, however, it is noted that the arbitration award did not include a provision granting the plaintiff pre-arbitration award interest; consequently, the court is without power to award such interest (*see*

Dermigny v Harper, 127 AD3d 685, 6 NYS3d 561 [2015]; ***Matter of Rothermel [Fidelity & Guar. Ins. Underwriters]***, 280 AD2d 862, 721 NYS2d 565 [2001]; ***Matter of State Farm Mut. Auto. Ins. Co. v Cordes***, 242 AD2d 635, 662 NYS2d 140 [1997]).

Dated: 2/23/16

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION