IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Oley Valley School District, Appellant	:	
v.	:	No. 60 C.D. 2010
Amthor Steel, Inc.	:	
Amthor Steel, Inc.	:	
v.	:	No. 61 C.D. 2010
Oley Valley School District, Appellant	:	
Amthor Steel, Inc.	:	
v.	:	No. 62 C.D. 2010
Oley Valley School District, Appellant	:	
Oley Valley School District, Appellant	:	
v.	:	No. 63 C.D. 2010
	:	Submitted: September 13, 2010
Amthor Steel, Inc.	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** December 10, 2010

Appellant, Oley Valley School District (Oley Valley), appeals from the order of the Court of Common Pleas of Montgomery County (common pleas) granting Appellant, Amthor Steel's (Amthor), petition to confirm arbitration award and denying Oley Valley's amended petition to vacate arbitration award. This matter concerns Amthor's claim for the balance due under its contract with Oley Valley to supply and erect structural steel at the Oley Valley Middle School. We affirm.

On September 20, 2004, Amthor filed a Demand for Arbitration against Oley Valley. Oley Valley filed an answer and counterclaim. The parties mutually agreed to arbitrate the dispute through the Construction Arbitration Panel of the American Arbitration Association (AAA). The parties participated in the selection of three arbitrators, who conducted thirteen hearings beginning on October 23, 2007.[1] In a disclosure statement dated November 15, 2007, chairman Chanin advised the parties that in September 2006 he was appointed to serve on an unrelated arbitration panel with Robert Korn, Esq. of Kaplin Stewart Meloff Reiter & Stein, P.C. (Kaplin Stewart). Kaplin Stewart represented Amthor in the arbitration at issue. Mr. Korn was not involved in Kaplin Stewart's representation of Amthor. Oley Valley challenged chairman Chanin's continued service as an arbitrator asserting that his failure to disclose his co-arbitrator relationship with a member of Kaplin Stewart breached AAA's rules and code of ethics. Oley Valley requested that Chairman Chanin recuse himself from the panel, a request which he denied. On November 20, 2007, AAA denied Oley Valley's request to remove chairman Chanin and dismiss the entire panel.

[1] The three arbitrators chosen were: Bernard Chanin, Esquire, Thomas J. Beagan, Jr., Esquire and Charles P. MacIntosh, Jr.

On October 22, 2008, the arbitrators entered an award and supporting opinion in favor of Amthor and against Oley Valley in the amount of $1,951,817.50 plus interest as well as an additional $60,410.40 for reimbursement of AAA administrative fees and arbitrator expenses (the Award). On November 7, 2007, Amthor Steel filed a petition to confirm the Award in common pleas. On November 20, 2007, Oley Valley filed a petition to vacate the arbitration award.[2] The following documents were filed in relation to the petition to confirm:

1. Oley Valley's answer and new matter to the petition to confirm;
2. Amthor's preliminary objections to Oley Valley's answer and new matter to the petition to confirm;
3. Oley Valley's amended answer and new matter to the petition to confirm;
4. Amthor's preliminary objections to Oley Valley's amended answer with new matter to the petition to confirm;
5. Oley Valley's answer to Amthor's preliminary objections to the amended answer with new matter to the petition to confirm.

The following documents were filed in relation to Oley Valley's petition to vacate:

1. Amthor's preliminary objections to Oley Valley's petition to vacate;
2. Oley Valley's amended petition to vacate the arbitration award;
3. Amthor's preliminary objections to the amended petition to vacate;
4. Oley Valley's answer to Amthor's preliminary objections to the amended petition to vacate;
5. Argument praecipe on Amthor's preliminary objections to the amended petition to vacate;

[2] The petition to confirm and the amended petition to vacate were consolidated onto one docket on March 10, 2009.

6. Amthor's memorandum of law in support of its preliminary objections to the amended petition to vacate;
7. Oley Valley's memorandum of law in opposition to Amthor's preliminary objections to the amended petition to vacate.

On June 12, 2009, common pleas held oral argument on Amthor's preliminary objections to Oley Valley's amended petition to vacate. On December 29, 2009, common pleas entered an order granting the petition to confirm. On January 4, 2010, common pleas entered an order denying the petition to vacate. Oley Valley filed notices of appeal in this court, appealing both the grant of the petition to confirm and the denial of the petition to vacate. Common pleas filed an opinion explaining its decision pursuant to Pennsylvania Rule of Appellate Procedure 1925(a).

Oley Valley's assertions regarding common pleas' errors can be divided into the following categories: (1) failure to find that the arbitration panel denied Oley Valley a fair hearing where the panel exceeded the authority granted to it by the parties' contract; (2) failure to find that the arbitration award was the result of misconduct and irregularity; and (3) failure to adhere to procedural rules and failure to rule on pending preliminary objections.

I. The Panel Exceeded Its Authority

A. Standard of Review

Oley Valley asserts that common pleas erred in denying the petition to vacate because it was denied a fair hearing when the panel exceeded its authority. In support of this contention, Oley Valley first argues that common pleas used the wrong standard of review in ruling upon the motion to vacate. Oley Valley asserts that it has an absolute right to appeal from the arbitration award and that the

contract explicitly preserved the parties' right to a judicial forum and a trial on all arbitrated issues.

Section 4.9 of the contract governs arbitration between the parties. Section 4.9.1 provides in relevant part:

> [a]ny controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof ….

Reproduced Record (R.R.) at 37a. Section 4.9.7 of the contract provides: "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." R.R. at 38a. The parties supplemented the contract with supplementary general conditions. Section 4.9.8 of the supplementary general conditions provides:

> If a dispute should arise between the Contractor and the Owner over the payment of such retainage and final payment, then such dispute shall be arbitrated under the applicable terms of the contract. Both parties may mutually agree to arbitrate the dispute through the Construction Arbitration Panel of the American Arbitration Association rule then obtaining, or in accordance with the Act of April 25, 1927 (P.L. 381, No. 248), referred to as the arbitration by contract law. In any event, either party shall have the right of appeal from any decision and award as provided by law.

R.R. at 66a.

Oley Valley argues that pursuant to Section 4.9.8 of the supplementary general conditions, the arbitration award was to be reviewed pursuant to the standard of review provided by the Uniform Arbitration Act of 1927.[3] In particular, Oley Valley relies upon the language in Section 4.9.8 stating that the parties may agree to arbitrate under AAA "*or in accordance with the Act of April 25, 1927 (P.L. 381, No. 248), referred to as the arbitration by contract law*." (Emphasis added).

The 1927 Act provided that a court could modify or correct an arbitration award where it was contrary to the law and was such that had it been a verdict of a jury, the court would have entered a different judgment or judgment notwithstanding the verdict.[4] *Nationwide Mutual Ins. Co. v. Heintz*, 804 A.2d 1209, 1214 (Pa. Super. 2002); *Popskyj v. Keystone Ins. Co.*, 565 A.2d 1184 (Pa. Super. 1984). The 1927 Act was replaced with the Pennsylvania Uniform Arbitration Act, 42 Pa. C.S. §§ 7301-7320, which provides for a much more

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[3] Act of April 25, 1927, P.L. 381, No. 248, 5 P.S. § 161, §§ 161-181 (now repealed).

[4] The 1927 Act provided that the court shall make an order modifying or correcting the award upon the application of any party to the arbitration:

> (a) Where there was an evident material miscalculation of figures, or an evident material mistake in the description of any person, thing or property referred to in the award.
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
> (d) Where the award is against the law, and is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict.
> The court may modify and correct the award or resubmit the matter to the arbitrators.

5 P.S.§ 171.

restricted review of arbitration awards. The Uniform Arbitration Act provides the following standard of review for common law arbitration awards:

> The award of an arbitrator in a nonjudicial arbitration which is not subject to Subchapter A (relating to statutory arbitration) or a similar statute regulating nonjudicial arbitration proceedings is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.

42 Pa. C.S. § 7341. An arbitration agreement is presumed to be an agreement to submit to common law arbitration, *i.e.* 42 Pa. C.S. § 7341, unless the agreement is in writing and expressly provides for arbitration pursuant to the Uniform Arbitration Act or another statute.[5] 42 Pa. C.S. § 7302(a). Pennsylvania courts have specifically stated that "[a]n agreement to arbitrate in accordance with the Rules of the AAA is an agreement pursuant to common law arbitration." *Midomo Co., Inc. v. Presbyterian Hous. Dev. Co.*, 739 A.2d 180, 183 (Pa. Super. 1999); *Runewicz v. Keystone Ins. Co.*, 476 Pa. 456, 383 A.2d 189, 191 (1978) (stating that an arbitration clause providing for arbitration pursuant to AAA rules and indicating that the parties are bound by the arbitration decision denotes common law arbitration).

[5] 42 Pa. C.S. § 7302 provides:

> An agreement to arbitrate a controversy on a nonjudicial basis shall be conclusively presumed to be an agreement to arbitrate pursuant to Subchapter B (relating to common law arbitration) unless the agreement to arbitrate is in writing and expressly provides for arbitration pursuant to this subchapter or any other similar statute, in which case the arbitration shall be governed by this subchapter.

Common pleas rejected Oley Valley's reliance upon section 4.9.8 of the general supplementary conditions. The contract and general supplementary conditions are clear and unambiguous. The parties may proceed to arbitrate under either the AAA or the 1927 Act. Once either common law (AAA) or contract law (1927 Act) arbitration is chosen, the parties are bound by the standard of review applicable to the chosen form of arbitration. The parties are not permitted to arbitrate under the AAA and then demand review under the 1927 Act as asserted by Oley Valley. The parties chose to proceed under AAA common law arbitration. Accordingly, the award may only be vacated where it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.

B. Contract Limitations Period, Steel Act, Compound Interest

Oley Valley's second argument in support of its contention that it was denied a fair hearing is that the arbitration panel exceeded its authority. Oley Valley contends that the panel exceeded it authority by considering claims that the parties agreed were not subject to arbitration, requiring Oley Valley to commit an illegal act and awarding compound interest.

Under common law arbitration, arbitrators are the final judges of both law and fact, and an arbitration award is not subject to reversal for a mistake of either. *Gargano v. Terminix Int'l Co.*, 784 A.2d 188, 193 (Pa. Super. 2001). Thus, neither the appellate court nor the trial court may retry the issues addressed in an arbitration proceeding or review the panel's disposition of the merits of the case. *McKenna v. Sosso,* 745 A.2d 1, 4 (Pa. Super. 1999). In addition, an appellant "bears the burden to establish both the underlying irregularity and the resulting inequity by 'clear, precise and indubitable evidence.'" *Gargano*, 784 A.2d at 193

(citations omitted). "In this context, irregularity refers to the process employed in reaching the result of the arbitration, not the result itself." *Id*. A cognizable irregularity may appear in the conduct of either the arbitrators or the parties. *McKenna*, 745 A.2d at 4. Our Supreme Court has stated that the phrase "other irregularity" in the process employed imports "such bad faith, ignorance of the law and indifference to the justice of the result" as would cause a court to vacate an arbitration award. *Allstate Ins. Co. v. Fioravanti*, 451 Pa. 108, 116, 299 A.2d 585, 589 (1973).

Oley Valley contends that the arbitration panel improperly ruled upon several claims that were asserted outside the contract's limitation period. Specifically, the contract requires that a demand for arbitration must be filed within 30 days after the architect rendered a final decision. Following denial of its first claim by the architect, Amthor notified Oley Valley that it was not going to submit its claims to arbitration in accordance with the contract but rather within 30 days of substantial completion of the project. Oley Valley did not object to Amthor's written notice of intent. Ultimately, Amthor did not submit its claims to arbitration until nearly two years after substantial completion of the project. Oley Valley filed a motion to dismiss with the arbitration panel on this issue. The panel issued an opinion on December 12, 2007, denying Oley Valley's request to dismiss the arbitration for failure to institute arbitration within the limitation period. Oley Valley's argument that the arbitration demand was time barred because the contract's limitations period had expired does not fall within the appealable scope of review. Any errors of law or fact committed by the panel with regard to the limitations period are not reviewable.

Oley Valley also alleges that the panel exceeded its authority by requiring Oley Valley to commit the illegal act of paying for steel without the proper certifications in violation of the Steel Products Procurement Act (Steel Act).[6] Section 5 of the Steel Act provides in relevant part:

> No public agency shall authorize, provide for or make any payments to any person under any contract containing the provision required by section 4 unless, when unidentified steel products are supplied under a contract, such person has provided documentation including, but not limited to, invoices, bills of lading, and mill certification that the steel was melted and manufactured in the United States, which establish that such person has fully complied with such provision. If a steel product is identifiable from its face, such person must submit certification which satisfies the public agency that such person has fully complied with the provision required by section 4. Any such payments made to any person by any public agency which should not have been made as a result of this section shall be recoverable directly from the contractor, subcontractor, manufacturer or supplier who did not comply with section 4 by either such public agency or the Attorney General of Pennsylvania.

73 P.S. § 1885. Oley Valley asserted throughout the course of the arbitration that the certifications provided by Amthor did not comply with the requirements of the Steel Act and, therefore, any payment to Amthor is in violation of the law. The panel also considered this issue and addressed it in its opinion and award of October 22, 2008. The panel concluded that Amthor had provided sufficient documentation and that Oley Valley's contentions were without merit.

[6] Act of March 3, 1978, P.L. 6, 73 P.S. §§ 1881 - 1887

Again, Oley Valley's arguments fall outside the appealable scope of review. Oley Valley is once again trying to characterize an alleged error of law as an irregularity meriting vacation of the award. We further note that there is no binding precedent regarding what constitutes sufficient documentation to satisfy the prerequisites of the Steel Act. Oley Valley relies upon *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), the only case which contains any significant treatment of the Steel Act. Although informative and persuasive, *Trojan Technologies* is not binding upon Pennsylvania courts. The panel was free to interpret the Steel Act as it chose.

Finally, Oley Valley asserts that the panel exceeded its authority by awarding compound interest. Citing *In re Estate of Braun*, 650 A.2d 73 (Pa. Super. 1994), Oley Valley contends that Pennsylvania law does not permit the award of compound interest.

As noted in *Braun*, our Supreme Court, in *Ralph Myers Contracting Corp. v. Commonwealth of Pennsylvania, Department of Transportation*, 496 Pa. 197, 201, 436 A.2d 612, 614 (1981) stated: "It is generally true that the law of this Commonwealth frowns on an award of compound interest on a debt except where the parties agree to it or a statute expressly authorizes it." In the present case, however, the record does not appear to reflect an award of compound interest. Even if it did, however, the parties' contract provided for interest from the date payment was due, and interpretation of that provision, like the rest of the contract, was a matter for the arbitrators. Even an erroneous interpretation, like any erroneous fact-finding, is beyond our scope of review.

II. The Award Was the Result of Misconduct and Irregularity

Oley Valley contends that the arbitration award was the result of misconduct and irregularity because Mr. Chanin failed to disclose a prior co-arbitrator relationship between himself and a member of Kaplin Stewart. Both the AAA and common pleas rejected Oley Valley's argument on this issue; we also conclude this argument lacks merit.

In order to disqualify an arbitrator or demonstrate bias, the objecting party must make "a showing of a direct relationship between a party to an arbitration proceeding and a designated arbitrator … such as the existence of a prior employer-employee or attorney-client relationship …." *Land v. State Farm Mut. Ins. Co.*, 600 A.2d 605, 607 (Pa. Super. 1991). Thus, to disqualify Mr. Chanin as an arbitrator, Oley Valley was required to show that he had a direct relationship with either Amthor or its attorneys. The facts of this case do not demonstrate a direct relationship. Mr. Chanin was appointed as an arbitrator in the case at hand in 2004. The case was stayed from 2004 through 2007 as the parties litigated whether the Steel Act claims were properly raised in the arbitration or before the court of common pleas. While the case was stayed, Mr. Chanin was appointed to an arbitration panel in an unrelated case. A co-arbitrator on the second panel is a partner in Kaplin Stewart. The co-arbitrator did not participate in Kaplin Stewart's representation of Amthor. Mr. Chanin stated that he and his co-arbitrator did not discuss the Oley Valley – Amthor arbitration. Initially, Mr. Chanin did not believe that he was required to disclose his appointment as a co-arbitrator. However, he reconsidered his decision and disclosed the appointment to Amthor and Oley Valley in November 2007. The relationship between Mr. Chanin and Kaplin Stewart is clearly indirect and extremely attenuated. Mr. Chanin does

not have an attorney-client relationship, employer-employee relationship or co-counsel agreement with Kaplin Stewart. Mr. Chanin has no monetary relationship with Kaplin Stewart. To hold that a co-arbitrator relationship automatically disqualifies an arbitrator would make the empanelling of an arbitration panel nearly impossible.

Thus, we conclude that the award was not a result of misconduct or irregularity on the part of the arbitration panel.

III. Procedural Irregularities

Oley Valley contends that common pleas erred in granting the petition to confirm and denying the petition to vacate where there were outstanding, unbriefed preliminary objections, the parties had not filed briefs in support or in opposition to the petitions, discovery was not concluded and oral argument had not been held on the petitions.

Pursuant to 42 Pa. C.S. § 7342(b), a party may petition a court more than 30 days after an award is made by an arbitrator under 42 Pa. C.S. § 7341 (relating to common law arbitration) to confirm the award. The court shall enter an order confirming the award and shall enter a judgment or decree in conformity with the order if the opposing party fails to file a petition to vacate or modify the award within 30 days. *See* 42 Pa. C.S. § 7314(b); 42 Pa. C.S. § 7342(b); *U.S. Claims, Inc. v. Dougherty*, 914 A.2d 874, 877 (Pa. Super. 2006) (Pennsylvania courts have consistently interpreted section 7342(b) to require that any challenge to the arbitration award be made in an appeal to the Court of Common Pleas, by filing a petition to vacate or modify the arbitration award within 30 days of the date of the award).

Oley Valley's primary argument is that common pleas erred in granting the petition to confirm and denying the petition to vacate because the petitions were never briefed and oral argument was never held. Following entry of the arbitrators' award and opinion, both parties filed petitions with common pleas. Amthor filed a petition to confirm the award and Oley Valley filed a petition to vacate the award. The petitions were treated as initial complaints and the parties filed answers, new matters and preliminary objections thereto. The petitions were subsequently consolidated under one docket. The parties filed briefs in support of and in opposition to Amthor's preliminary objections to the amended petition to vacate. Common pleas held oral argument on these preliminary objections. The parties did not file briefs in support of or in opposition to Amthor's preliminary objections to Oley Valley's answer and new matter to the petition to confirm. Common pleas thereafter issued two orders which provide:

> AND NOW, this 29th day of December, 2009, after oral argument and review of briefs, it is hereby ORDERED and DECREED that Amthor Steel's Petition to Confirm the October, 2008 American Arbitration Association's arbitration award entered in the amount of $1,951,817.50 in the above-captioned matter is hereby GRANTED, and the award stands.

> AND NOW, this 4th day of January 2010, after oral argument and review of briefs, it is hereby ORDERED and DECREED that Oley Valley School District's Petition to Vacate the October, 2008 American Arbitration Association's arbitration award entered in the amount of $1,951,817.50 in the above captioned matter is hereby DENIED, and the award stands.

Oley Valley seems to be arguing that common pleas could not grant the petition to confirm and deny the petition to vacate by ruling upon the preliminary objections. Oley Valley seems to be arguing that separate briefing and argument on the petitions themselves was required. In its memorandum of law in opposition to Amthor's preliminary objections to the amended petition to vacate, Oley Valley notes that Amthor filed preliminary objections in the nature of a demurrer and challenged the subject matter jurisdiction. R.R. at 1687a. Oley Valley further noted that a demurrer is not to be sustained unless the complaint (the amended petition to vacate in this instance), as taken on its face, shows that the law will not permit recovery. R.R. 1687a. As noted above, these preliminary objections were fully briefed and argued. By denying the petition to vacate, common pleas clearly found the petition to vacate insufficient and sustained Amthor's demurrer. Sustaining a demurrer to the petition to vacate would necessarily mean that the award must be confirmed, so requiring further motions and briefing would have been an unnecessary exercise.[7]

Oley Valley also argues that common pleas failed to follow local petition practice procedure. As noted above the petitions were treated as initial filings, *i.e.* complaints. The parties followed the initial pleadings procedures by filing answers, new matters and preliminary objections. Common pleas accordingly ruled upon the preliminary objections pursuant to the preliminary objection standard of review. Because the trial court and the parties treated the petitions as complaints and followed initial pleading procedures, it logically

[7] For these reasons, Oley Valley's assertion that the petition to confirm and the petition to vacate were not ripe for decision also are without merit.

follows that common pleas was not required to follow local petition practice procedures. Thus, Oley Valley's contentions are without merit.

Finally, Oley Valley asserts that common pleas erred because it raised several issues of fact on which it was entitled, under the Pennsylvania Rules of Civil Procedure and local rules, to conduct discovery and be heard at oral argument. As noted above, common pleas ruled upon the preliminary objections to the amended petition to vacate. Common pleas found that based on the facts alleged in the petition to vacate that Oley Valley's petition was without merit. Thus, any discovery motions were moot.

For all of the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 10th day of December, 2010, the order of Court of Common Pleas of Montgomery County in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge