Sahni v New York Stock Exch.
2004 NY Slip Op 30387(U)
October 27, 2004
Supreme Court, New York County
Docket Number: 105274/04
Judge: Kibbie F. Payne

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

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CHARANJIT SAHNI and HARPREET SAHNI,

Petitioners,

–against-

Index No.: 105274/04
Motion Seq. 003

THE NEW YORK STOCK EXCHANGE, PRUDENTIAL SECURITIES INCORPORATED, STUART SKLAR, MARTIN KENNEDY, and ROBIN HENRY,

DECISION/ORDER

Respondents.

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KIBBIE F. PAYNE, J.:

On May 19, 2004, petitioners moved for an order, pursuant to Article 75 of the CPLR, to remove one of three arbitrators, respondent Robin Henry, from an arbitration panel of New York Stock Exchange (NYSE). Petitioners claimed Ms. Henry had exhibited actual bias and partiality towards petitioners during the course of a pending arbitration proceeding. This underlying proceeding involved claims of breach of fiduciary obligation and inappropriate trading by respondent Prudential Securities, Inc. (Prudential), in connection with petitioners' brokerage account.

On June 17, 2004, prior to the issuance of this court's decision on the initial application, petitioners moved again, without leave of this court and in violation of proper motion procedure, for the removal of Ms. Henry on the ground of purported newly discovered facts relating to alleged complaints of bias on the part of Ms. Henry in an unrelated case and her misstatement of post graduate studies as contained in her NYSE Arbitrator Profile. Thereafter following the submission of the second application and again prior to this court's decision on that motion, petitioners' attorney, on August 25, 2004, filed the present and third application couched as a

post-judgment application to vacate this court's July 27, 2004, to disqualify Ms. Henry as an arbitrator and in the alternative for a new hearing predicated upon newly discovered evidence of alleged "conflict of interest." In this instant application petitioners now claim Ms. Henry's affiliation with certain civic and professional organizations that have received contributions from the brokerage industry should disqualify Ms. Henry as an arbitrator in the underlying proceeding. As a result, petitioners' attorney sought an order relieving petitioners of the judgment rendered June 30, 2004 (CPLR 5015 [a] [2]).

This court has previously indicated to counsel in the August 26, 2004 order, that the procedural tactics employed by petitioners' attorney constitute "a flagrant abuse of motion practice." On September 1, 2004, the return date of the order to show cause, counsel for petitioner in open court attempted to excuse his abuse of motion procedure, by asserting that he had withdrawn the second application. At no time, however, was any request for such withdrawal submitted to the part clerk nor to chambers. Moreover, an examination of the County Clerk's file maintained for these proceedings fails to disclose any letter or notice of counsel's request for withdrawal. As a result of the procedural tactics employed by petitioners' counsel, this court did not reach the merits of petitioners' second application for removal of Ms. Henry. This court will not consider the merits of petitioners' third application due to the identical procedural tactics employed by petitioners' counsel. However were this court to consider this third application, the present order to show cause with its supporting affidavits and allegations concerning respondent Henry's affiliations, such claims do not on their face create any conflict of interest nor do they warrant the disqualification of this arbitrator. In fact the most recent allegations appear to be nothing more than a supplement to petitioners' previous arguments

concerning misrepresentations and non-disclosures of unrelated matters. With due diligence all of these claims could have and should have been included in petitioners' original application. This court has determined that counsel's arguments were insufficient to warrant judicial removal under either Article 75 of the CPLR or the Federal Arbitration Act (FAA), (see *Aviall, Inc. v Ryder System. Inc.*, 110 F3d 892, 895). The Appellate Courts have opined that the trial court "in an appropriate case" has the inherent power to disqualify and remove an arbitrator before an award has been rendered (*see, Matter of Astoria Medical Group v Health Ins. Plan of Greater New York*, 11 NY2d 128, 132; *County of Niagara v Bania*, 6 AD2d 1223, *Matter of Excelsior 57th Corp. [Kern]*, 218 AD2d 528, 530; *Rabinowitz v Olewski*, 100 AD2d 539, 540). Respondent Henry may be obligated under Rule 610 of the NYSE Arbitration Rules to more fully disclose her affiliations, and to disclose Attorney Farley's previous appearance before her in a prior arbitration proceedings. Nevertheless under the totality of circumstances of this case, where there is an absence any evidence of impropriety or of any disqualifying relationship, petitioners' assertions lack the required probative value to warrant the judicial removal of Ms. Henry as an arbitrator in the pending arbitration proceeding. Accordingly, it is

ORDERED that the motion to vacate the judgment of June 30, 2004 is denied; and it is further

ORDERED that respondents' application for the imposition of costs and sanctions pursuant to 22 NYCRR § 130-1.1, as contained in their memorandum of law in opposition and as requested on the hearing of the order to show cause on September 1, 2004, is granted to the extent that a hearing is directed. Subsequent to the submission of this application, petitioners' counsel requested permission to respond to the respondents' request for the imposition of

sanctions. Although clearly aware of the application for sanctions, petitioners' counsel failed to make such request on the return date of the order to show cause and prior to submission of the motion. Petitioners' counsel chose to oppose the application for sanctions in his oral argument on September 1, 2004 and, therefore, waived the right to additional opposition. This subsequent and untimely request by petitioners' attorney for an extension of time to respond is merely another attempt to piecemeal his request for relief. Therefore, it is further

ORDERED that the attorneys for all parties shall appear before this court, IAS Part 4, Room 136, 80 Centre Street, on November 15, 2004, at 9:30 A.M. for the purpose of conducting a hearing on the issues of (1) whether petitioners' counsel has engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1 (c); and (2), in the event such a finding is made, the amount, if any, of costs and/or sanctions to be imposed. The foregoing constitutes the decision and interim order of the court.

DATED: October 27, 2004

ENTER:

J. S. C.