SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Fee Dispute Arbitration Between
DIMITRY ARONSHTEIN and OLGA ARONSHTEIN,

Petitioners,

- against -

DAVID J. SUTTON, P.C.,

Respondent.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 601463/13
Motion Seq. No.: 01
Motion Date: 07/17/13
XXX

AMENDED DECISION and ORDER

The following papers have been read on this application:

	Papers Numbered
Notice of Petition, Petition, Affidavit in Support, Affirmation in Support and Exhibits	1
Answer and Affirmation in Opposition and Exhibits	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioners move, pursuant to CPLR § 7511, for an order vacating the arbitration award dated March 7, 2013. Respondent opposes the application.

The instant proceeding was commenced by petitioners to vacate an arbitration award issued by a panel of arbitrators in the 10th Judicial District, Supreme Court, Nassau County, in favor of respondent, dated March 7, 2013 (the "Award"). Petitioners allege that "the arbitrators imperfectly executed the Award by failing to reach issues of fact and law that had been submitted to them, namely that Respondent had failed to make arguments in litigation in this Court to

support claims that Petitioners had made and relief that they had requested, and had failed to obey instructions explicitly given to Respondent by Petitioners, their clients in the litigation, to make certain arguments, and that as a result of Respondent's conduct, Respondent's billings to Petitioners were *per se* unreasonable. Petitioners also argue that the arbitrators manifestly disregarded material issues of law, in theat they disregarded the regulations of 22 NYCRR Part 317, of which they were aware, that the attorney's billings had to be reasonable, when limiting the issues at the hearing to whether Respondent had done the work it had listed on its bills and whether that work had been billed to Petitioners. Petitioners also allege that the arbitrators reached an irrational result in light of the undisputed facts presented to them, and manifestly disregarded such facts, that Respondent disregarded its clients' express instructions to seek certain relief and press a counterclaim on summary judgment, thus causing harm to Petitioners in this litigation."

Respondent had represented petitioners in the Nassau County Supreme Court matter, *Robert Klein and Susan Klein v. Dimitry Aronshtein and Olga Aronshtein*, Index No. 16338/2000 (the "Klein Action"). *See* Petitioners' Affirmation in Support Exhibit A. On May 14, 2012, this Court rendered a Decision and Order with respect to the motions submitted in the Klein Action in which plaintiffs Kleins had moved, pursuant to CPLR § 3212, for an order granting them summary judgment and defendants Aronshteins had opposed the motion and cross-moved, pursuant to CPLR § 3212, for an order granting them summary judgment dismissing plaintiffs' Verified Complaint and for judgment, *inter alia*, on their first and second Counterclaims. *See* Petitioners' Affirmation in Support Exhibits D, E and F; Respondent's Affirmation in Opposition Exhibit C.

Said Decision and Order held that it was

> "**ORDERED** that plaintiffs' motion (Seq. No. 03), pursuant to CPLR § 3212, for an order granting them summary judgment on their first adverse possession cause of action is hereby **DENIED**. And it is further
> **ORDERED** that defendants' cross-motion (Seq. No. 04), pursuant to CPLR § 3212, for an order granting them summary judgment is hereby **GRANTED to the extent that the plaintiffs' first, adverse possession cause of action is dismissed**, and the cross-motion (Seq. No. 04) is **otherwise hereby DENIED**.
> All parties shall appear for Trial in the Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on June 14, 2012, at 9:30 a.m." *See* Petitioners' Affirmation in Support Exhibit G.

Petitioners assert that, in the aforementioned cross-motion filed in the Klein Action, respondent failed to "follow Petitioners' directions and make arguments that Petitioners had specifically instructed Respondent to make." As a result of same, petitioners refused to pay respondent's outstanding billings.

Respondent brought an arbitration proceedings against petitioners by request for fee arbitration dated December 11, 2012, seeking an award in the total amount of $38,158.23. *See* Petitioners' Affirmation in Support Exhibit M. On January 9, 2013, petitioners served a response to the arbitration request. An arbitration hearing was held on March 7, 2013, at the Law Offices of Russell D. Mauro in Wantagh, New York, before arbitrators Russell D. Mauro, Esq., Donna M. Fiorelli, Esq. and Bernard Davis. Petitioner Dimitry Aronshtein, with his counsel, and respondent were present at the hearing.

Petitioners submit that "Dimitry Aronshtein testified (not under oath) at the hearing that Respondent had failed to follow his explicit instructions that Respondent argue that the Kleins

had interfered with Petitioners' riparian rights. Dimitry Aronshtein also testified that Respondent had failed to argue that the Kleins' houseboat should be removed from the waters above Lot 64 notwithstanding that the cross motion had requested that the Kleins be ejected from Lot 64. Neither Sutton nor Curry [counsel for respondent] denied the substance of Dimitry Aronshtein's testimony, nor did they give any justification for disregarding Petitioners' instructions or failing to press for an order immediately removing the Kleins' houseboat."

Petitioners claim that "[a]t the hearing, the chairman stated that the arbitrators were limited in the arbitration to determining whether Respondent had performed and billed Petitioners for legal work, and whether Petitioners had paid Respondents'(*sic*) bills." Counsel for petitioners, who was present at the arbitration hearing, objected to this during said hearing, "stating that that eliminated from consideration the critical elements of whether Respondent had performed services for which they were reasonably entitled to payment, because those services did not benefit Petitioners. The arbitrators responded that they did not consider those issues to be within their purview, only whether legal services of any nature were performed and billed to Petitioners." Petitioners contend that, consequently, "[a]lthough they allowed D. Aronshtein to testify..., the arbitrators disregarded all of his testimony as to Respondent's refusal to follow D. Aronshtein's instructions and failure to follow through on the riparian rights counterclaim and the request to eject the Kleins from Lot 64, again based on the notion that the arbitrators were not empowered to decide whether Respondent's conduct had resulted in billings that were *per se* unreasonable."

Petitioners argue that "[t]he arbitrators disregarded the provisions of 22 NYCRR Part 317 for conduct of attorneys' fee arbitrations, of which they were clearly aware, that the attorney had the burden of showing that its billings were reasonable by limiting the scope of the arbitration to

the facts of the services being performed and billed. During the hearing, the arbitrators refused to consider whether Respondent had performed its work in compliance with Petitioners' instructions and whether Respondent's failure to do so make their billings for services *per se* unreasonable. They merely reviewed Respondent's bills."

In the March 7, 2013 Arbitration Award, the arbitrators awarded respondent $28,158.23, which is $10,000.00 less than the amount demanded by respondent. *See* Petitioners' Affirmation in Support Exhibit P.

Petitioners contend that "no evidence was offered during the hearing or otherwise establishing that Respondent was 'entitled' to an amount that was exactly $10,000 less than the amount demanded. The Award actually represented a compromise among the arbitrators to give Respondent the bulk of the fees it sought while appearing to be evenhanded."

Petitioners further argue that "the arbitrators also reached an irrational result on the undisputed facts placed before them and manifestly disregarded the facts, in that there was no way in which the arbitrators could have rationally concluded that Respondent's billings were reasonable where Respondent disobeyed Petitioners' explicit instructions without justification and failed to press the riparian rights counterclaim or seek immediate removal of the Kleins' houseboat."

Petitioners submit that "[i]n this case, the arbitrators could not assess the reasonableness of Respondent's fees without considering whether Respondent performed the work it should have performed. In other words, because Respondent stated in the notice of cross motion...that Petitioners were seeking to have the Kleins ejected from Lot 64 but then never pursued arguments that could have resulted in the removal of the houseboat, despite the explicit instructions of D. Aronshtein that Respondent pursue that result, the billings for Respondent's

work for in connection with the cross motion were *per se* unreasonable because they could not have accomplished the purpose for which the services were ostensibly performed. Similarly, because Respondent never made the argument that the Kleins had interfered with Petitioner's riparian rights - one of Petitioners' counterclaims, which the cross motion was made to seek summary judgment with respect to - Respondent's billings for the work on the cross motion for summary judgment could not have been reasonable because the cross motion could not have resulted in the grant of that branch of the cross motion."

In opposition to the application, respondent asserts that, with respect to the May 14, 2012 Decision and Order of this Court, "[t]he decision (and this office's work) was a near-total victory for the Aronshtein's (*sic*). This Court denied plaintiff's (*sic*) motion for summary judgment and granted the Aronshtein's (*sic*) cross-motion to dismiss the Klein's (*sic*) adverse possession claim. The Court denied the Aronshtein's (*sic*) two counterclaims, holding that there was a questions of fact about the issues of the Klein's (*sic*) trespass versus their riparian rights, and the Klein's (*sic*) riparian rights versus the Aronshtein's (*sic*) riparian rights."

Respondent further contends that "[t]he subject Arbitration Award concerns unpaid attorney fees that have been incurred since approximately August, 2011. Petitioners claim that they stopped making payments to this office because we supposedly failed to follow Petitioners' directions and make arguments that Petitioners had instructed us to make in the motion papers.... This is not correct. Throughout our representation, Petitioners were rarely current on their payments and often refused to pay our invoices, long before the decision on summary judgment. From June 7, 2010 through March 6, 2013 (the arbitration was held on March 7, 2013), Respondent sent Petitioners regular, monthly invoices with detailed breakdowns of the work performed, at the specified hourly rates.... Petitioners made a payment of $11,000.00 in August,

2011 on an invoice (the July 26, 2011 invoice) in the amount of $11,640.91.... Petitioners did not make another payment until March 2, 2012, in the amount of $7,000, even though the amount due and owing was $14,599.08.... The March, 2012 payment was the last payment Petitioners made. By the time all the motion papers were submitted on April 16, 2012, Petitioners owed $24,276.28. This was reflected in the April 18, 2012 invoice.... As usual, Petitioners refused to pay the April 18 invoice. Yet, the April 18 invoice was a month before the decision on the motions for summary judgment. In sum, Petitioners had a long history with this office of failing to make payments." *See* Petitioner's Affirmation in Support Exhibits I and J.

Respondent adds that "[i]n August, 2012, this office brought a motion by order to show cause to be relieved as counsel and to fix attorney fees in the amount of $32,305.00 and impose a charging/retaining lien in that amount. This Court issued a decision on the motion, setting the matter down for a hearing to determine the amount of the charging/retaining lien, to be held on November 16, 2012.... This office (David J. Sutton and Greg Curry), appeared on November 16, ready to proceed with the hearing. However, Mr. ARONSHTEIN and his attorney, William Rome, objected to going forward on that day and wanted the entire attorney fee dispute to be heard before arbitrators. In other words, in the past, Petitioners did not want this Court to hear the attorney fee dispute. They wanted the dispute decided by arbitrators. The fee dispute was heard by arbitrators; Petitioners were not happy with the outcome; so they are changing their position and now want this Court to decide the attorney fee dispute." *See* Respondent's Affirmation in Opposition Exhibit B.

With respect to the subject arbitration, respondent states that "[t]he arbitration lasted for approximately three (3) hours. As noted in the Petition, Petitioners and Respondent made voluminous submissions to the arbitrators - including the Retainer Agreement, the monthly

invoices, the papers on summary judgment, and this Court's May 14, 2012 decision. Petitioners chose not to have the arbitration recorded by a stenographer. As such, there is no transcript of what was discussed.... That same day, the arbitrators issued their Arbitration Award in the amount of $28,158.23. In other words, they deducted $10,000 from the attorney fees we were seeking. Contrary to Petitioners' claims, this was not an arbitrary reduction. The arbitrators used the approximately June, 2012 Notice of Substitution of Counsel as a cut-off date for the recoverable fees. The additional $10,000 in fees sought was related to this office trying to recover the unpaid fees, including drafting the motion to fix attorney fees, the additional court conferences that were involved, preparing for a hearing on attorney fees before this Court, and preparing for arbitration. Recouping costs for pursuing unpaid fees is provided for in the Retainer Agreement.... The arbitrators, however, made a finding that those additional amounts were not recoverable."

Respondent argues, "the allegations in the Petition that this office did not sufficiently argue that the houseboat interfered with Petitioners' riparian rights are contradicted by the motion papers, by this Court's decision on summary judgment, and even by Petitioners' own brief on appeal. Moreover, as a matter of law, the allegations, on their face, do not rise to the kind of irrational and severe, or fraudulent conduct by the arbitrators, to support vacating the March 7 Arbitration Award."

CPLR § 7511(b)(1) allows this Court to vacate an arbitrator's award if the Court finds that the rights of that party were prejudiced by "(i) corruption, fraud or misconduct in procuring the award; 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."

Arbitration decisions are subject to limited judicial review pursuant to CPLR Article 75

in order to comport with constitutional requirements of due process. *See Unigard Mut. Ins. Co. v. Hartford Ins. Group*, 108 A.D.2d 917, 485 N.Y.S.2d 805 (2d Dept. 1985). An arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power. *See Braver v. Silberman*, 90 A.D.3d 654, 936 N.Y.S.2d 211 (2d Dept. 2011). A claim that an arbitrator's award is irrational must be established by clear and convincing evidence. *See Muriel Siebert & Co. Inc. v. Ponmany*, 190 A.D.2d 544, 593 N.Y.S.2d 1010 (1st Dept. 1993). A mere mistake of fact or error in judgment on the part of the arbitrator, however, is not sufficient to render his or her award wholly irrational. *See Karlin v. Roman*, 143 A.D.2d 831, 533 N.Y.S.2d 123 (2d Dept. 1988). Indeed, it has been said that it is error to vacate an arbitration award for irrationality in the absence of finding that the award was the product of fraud or partiality or is so divorced from rationality that it can be accounted for only by misbehavior. *See Matter of Condell (Shanker)*, 151 A.D.2d 798, 542 N.Y.S.2d 387 (3d Dept. 1989).

An arbitrator's award may be vacated only upon the grounds specified in the statute, and if the party moving to vacate cannot establish one of the statutory grounds, the award must be confirmed. *See NFB Inv. Services Corp. v. Fitzgerald*, 49 A.D.3d 747, 854 N.Y.S.2d 457 (2d Dept. 2008); *New York City Transit Authority v. Transport Workers' Union of America, Local 100, AFL-CIO*, 6 N.Y.3d 332, 812 N.Y.S.2d 413 (2005); *Luri v. Sobus*, 289 A.D.2d 578, 735 N.Y.S.2d 187 (2d Dept. 2001).

Judicial review of arbitration awards is extremely limited. *See Wien & Malkin, LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 813 N.Y.S.2d 691 (2006). "An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached.'" *Id. quoting Matter of Andros Compania Martima, S.A. [Marc Rich & Co., A.G.]*, 579 F.2d 691 (1978). In addition, 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 the overseers to mold the award to conform to their sense of justice." *See Allstate Insurance Company v. GEICO*,

100 A.D.3d 878, 955 N.Y.S.2d 100 (2d Dept. 2012) *quoting Wien & Malkin, LLP v. Helmsley-Spear, Inc.*, *supra*. "An arbitrator is not bound by principals 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." *See Allstate Insurance Company v. GEICO*, *supra quoting Matter of Erin Constr. & Dev. Co., Inc. v. Meltzer*, 58 A.D.3d 729, 873 N.Y.S.2d 315 (2d Dept. 2009).

Based upon the papers submitted for consideration, the Court finds that petitioners have failed to meet their statutory burden. *See* CPLR § 7511. Petitioners have failed to prove, by clear and convincing evidence, that the arbitrators committed misconduct or were irrational in the manner in which the conducted the arbitration and reached their decision on the Award.

Accordingly, petitioners' instant application for an order vacating the arbitration award dated March 7, 2013 is hereby **DENIED**.

With respect to respondent's request for an order confirming the March 7, 2013 Arbitration Award, pursuant to CPLR § 7511(e), said request is hereby **GRANTED** and the March 7, 2013 Arbitration Award is hereby confirmed.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
September 20, 2013