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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 47

ISLAND TENNIS, LP, d/b/a SPORTIME,

Petitioner,

- against -

INDOOR COURTS OF AMERICA, INC., d/b/a ICA,

Respondent.

By: Jerry Garguilo, J.S.C.
Dated: September ___, 2013

Index No. 13-6142
Mot. Seq. #001 - MotD; CDISPSUBJ
Mot. Seq. #002 - XMD

Return Date: 4/12/13 (#001)
Return Date: 5/1/13 (#002)
Adjourned: 6/12/13

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In this article 75 proceeding, the petitioner, Island Tennis, LP, d/b/a Sportime ("Sportime"), seeks, *inter alia*, to confirm an arbitration award dated February 13, 2013, which was in its favor and against the respondent, Indoor Courts of America, Inc., d/b/a ICA ("ICA"), in the principal amount of $359,269.28, and ICA seeks to vacate the award. ICA separately moves to change the venue of this proceeding from Suffolk County to New York County and to consolidate this proceeding with a proceeding entitled *Matter of ICA Sports & Bldg. Sys. v Island Tennis* (Sup Ct, New York County, Index No. 13-651445).

The parties are signatories to a standard form contract dated November 20, 2006 pursuant to which ICA, as design-builder, agreed to perform design, construction, and other services on behalf of Sportime, as owner, in connection with the construction of an indoor tennis center on Randall's Island. The contract provides that all unresolved claims, disputes or controversies between the parties arising out of or relating to the contract shall be decided by arbitration, that the prevailing party in such arbitration shall be entitled to recover from the other party its reasonable attorney's fees and expenses, and that judgment may be entered on the arbitrator's award by any court having jurisdiction.

When substantial disputes arose between the parties during the performance of the contract, the parties proceeded to arbitration before the American Arbitration Association ("AAA"). Both parties were represented by counsel and participated in the arbitration. Following discovery and motion practice, the arbitrator conducted an eight-day hearing at which both parties presented witness testimony and documentary evidence. It appears that the parties' respective claims were ultimately synthesized into five claims on behalf of Sportime and nine counterclaims on behalf of ICA. The parties

subsequently submitted post-hearing briefs relative to those claims and counterclaims.

On February 13, 2013, the arbitrator issued the following award in favor of Sportime, as claimant, and against ICA, as respondent.

> I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated November 20, 2006, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, FIND, as follows:
>
> Claimant's Claims
>
> A. In connection with Claimant's claim for recovery of the retainage due Arizon by Respondent, Claimant is Awarded Sixty One Thousand Four Hundred Sixty Eight Dollars and Sixty Cents ($61,468.60).
>
> B. In connection with Claimant's claim relating to Empire Zone rebates, Claimant is Awarded Sixty Four Thousand One Hundred Seventy One Dollars and Twenty Two Cents ($64,171.22).
>
> C. In connection with Claimant's claim relating to deck leaks, Claimant is Awarded Forty Seven Thousand Eight Hundred Fifty Dollars ($47,850.00). No ruling is made in this arbitration, either granting or denying Respondent's right to deduct this $47,850.00 sum from the monies being withheld by Respondent under the WJL Remedial Agreement.
>
> D. In connection with Claimant's claim relating to the sewer pipe, Claimant is Awarded Twenty One Thousand Three Hundred Eighty Four Dollars and Thirty Eight Cents ($21,384.38). No ruling is made in this arbitration, either granting or denying Respondent's right to deduct this $21,384.38 sum from the monies being withheld by Respondent under the WJL Remedial Agreement.
>
> E. In connection with Claimant's claim relating to roof and skylight leaks, Claimant is Awarded Ninety One Thousand Five Hundred Fifty Five Dollars and Fifty Eight Cents ($91,555.58).
>
> Respondent's Counterclaims
>
> A. Respondent's counterclaim relating to the Design Builder's fee for project costs is denied.
>
> B. Respondent's counterclaim relating to the Design Builder's fee for project costs paid

directly by Claimant is denied.

C. Respondent's counterclaim relating to the Design Builder's fee for temporary power is denied.

D. In connection with Respondent's counterclaim relating to Payment Application 29, Respondent is Awarded Fifty Three Thousand Two Hundred Forty Eight Dollars ($53,248.00).

E. Respondent's counterclaim relating to Payment Application 30 is denied.

F. Respondent's counterclaim relating to Payment Application 31 is denied.

G. Respondent's counterclaim relating to Payment Application 32 is denied.

H. Respondent's counterclaim relating to Work Product is denied.

I. Respondent's counterclaim relating to the change order for the Sewage Pipe Ejector Pit is denied.

Recapitulation of amount Awarded to Claimant (exclusive of Interest and Attorneys Fees):

To Claimant:	$ 286,429.78
To Respondent:	$ 53,248.00
Net Awarded to Claimant:	$ 233,181.78

In addition to the above, Claimant is Awarded attorneys fees and pre-award interest in the amount $112,875.00, representing a total amount due Claimant of Three Hundred Forty Six Thousand Fifty Six Dollars and Seventy Eight Cents ($346,056.78).

Accordingly, I AWARD, as follows:

> Respondent shall pay to Claimant the net sum of Three Hundred Forty Six Thousand Fifty Six Dollars and Seventy Eight Cents ($346,056.78).

The administrative fees of the American Arbitration Association totaling $14,800.00 and the compensation of the arbitrator totaling $33,575.00, shall be borne as follows: Eighty Percent (80%) by Respondent and Twenty Percent (20%) by Claimant. Therefore Respondent shall reimburse Claimant the sum of $13,212.50 representing that portion of said fees in excess of the apportioned costs previously incurred by Claimant.

> If the amounts due are not paid within 30 days from the date of this Award, then interest shall accrue at the statutory rate of 9% per annum commencing on the 31st day from the date of this Award until paid.
>
> This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

This proceeding followed.

Addressing first ICA's request for a change of venue, which it contends is warranted as a matter of right based on Sportime's choice of an improper county (*see* CPLR 510 [1]), the court notes that venue generally shall be in a county in which any one of the parties resided at the time the action was commenced (CPLR 503 [a]) and that a partnership is deemed a resident of any county in which it has its principal office (CPLR 503 [d]). Here, it appears from the petition, and ICA does not dispute, that Sportime was a limited partnership having its principal office in Suffolk County at the time this proceeding was commenced. Where, as here, the parties' agreement does not specify the county in which a proceeding arising out of an arbitrable controversy shall be brought, the proceeding may be brought in any county where at least one of the parties resides (*see* CPLR 7502 [a] [i]). Consequently, ICA cannot be found to have satisfied its burden of establishing that the venue chosen by Sportime was improper (*see* ***Furth v ELRAC, Inc.***, 11 AD3d 509, 784 NYS2d 112 [2004]). ICA's further request for an order of consolidation is academic, the parties having discontinued the New York County proceeding by the filing of a stipulation dated June 12, 2013. ICA's motion is, therefore, denied.

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." Once a party has participated in the arbitration, as here, its ability to have a court vacate the award is limited by CPLR 7511 (b) (1), which provides that an award may be vacated only if the rights of that party were prejudiced by (i) corruption, fraud, or misconduct in procuring the award, (ii) partiality of a supposedly neutral arbitrator, (iii) the arbitrator exceeding his power or so imperfectly executing it so that no final and definite award was made, or (iv) failure to follow procedures provided by CPLR article 75. 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]). 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]).

As set forth in ICA's petition to vacate the award (in the since-discontinued New York County proceeding),[1] ICA objects[2] to the award on the following grounds:

> (i) misconduct in procuring the award in that the Arbitrator failed to rule on the ICA motion to dismiss Sportime's claims based on the defense of release by Sportime of ICA which would have been dispositive of the Sportime claims against ICA thereby violating a strong New York State public policy, demonstrating a manifest disregard of the law, and gave the release agreement provisions a totally irrational construction, (ii) the Arbitrator conducted inconsistent and disparate treatment between Sportime and ICA, (iii) the Arbitrator exceeded his power and so imperfectly executed the Arbitration Award in that the Arbitrator disregarded the operative agreements between ICA and Sportime, the attendant and governing AAA rules on the form of the award as well as the parties' proposed awards such that the Arbitration Award was irrational as well as not a final and definite award upon the subject matter submitted, [and] (iv) the arbitrator failed to provide all process due to ICA and failed to conduct a fair hearing * * *.

Now, upon review of the papers submitted, the court finds no basis for disturbing the award. ICA's objections are addressed below seriatim.

Initially, the court rejects ICA's claim that the arbitrator committed misconduct by failing to rule on its motion to dismiss. Even assuming that such failure may be found to constitute "misconduct" within the meaning of CPLR 7511 (b), it is evident that ICA did not suffer any resulting prejudice. Rather, whatever prejudice ICA may have suffered was a result of the arbitrator's express findings in favor of Sportime on its claims relating to the deck leaks and the sewer pipe, and its implicit finding that ICA's defense of release was either inapplicable to those claims or lacked merit. As to those findings, the court notes that any error on the part of the arbitrator is, under the circumstances, beyond the reach of judicial review (*see* ***Matter of Sprinzen [Nomberg]***, 46 NY2d 623, 415 NYS2d 974 [1979]). While an arbitration award may be vacated as illegal if, as ICA claims, it is violative of a strong public policy embodied in constitutional, statutory, or common law, a court "must be able to examine [the] award on its face, without engaging in extended factfinding or legal analysis, and conclude that public policy

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[1] When the parties stipulated to discontinue the New York County proceeding, they also stipulated in this proceeding that the petition and memorandum of law filed by ICA in the New York County proceeding, "which were attached to its Verified Answer in this special proceeding, shall be deemed an objection to the Arbitration Award in opposition to Sportime's Verified Petition to confirm the Arbitration Award in this proceeding * * *."

[2] A party may oppose an arbitration award either by motion pursuant to CPLR 7511 (a) to vacate or modify the award within 90 days after delivery of the award, or by objecting to the award on the grounds set forth in CPLR 7511 (b) upon an application to confirm the award notwithstanding the expiration of the 90-day period (***Matter of Brentnall v Nationwide Mut. Ins. Co.***, 194 AD2d 537, 598 NYS2d 315 [1993]).

precludes its enforcement" (*id.* at 631, 415 NYS2d at 978). Stated another way, the award itself must directly conflict with a strong public policy tantamount to illegality (*see* ***Matter of Troy Police Benevolent & Protective Assn. [City of Troy]***, 271 AD2d 926, 707 NYS2d 265 [2000]). Indirect or attenuated consequences of an award, which does not on its face violate a law, do not suffice (*see* ***Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York***, 94 NY2d 321, 704 NYS2d 910 [1999]). Here, there is no illegality in the award itself. To the extent ICA contends that the arbitrator demonstrated a "manifest disregard of the law" in failing to enforce the release, the court notes that this standard applies only to contracts governed by the Federal Arbitration Act (9 USC § 1, *et seq.*) and that ICA has not established that the parties' contract affects interstate commerce (*see* ***Wien & Malkin v Helmsley-Spear, Inc.***, 6 NY3d 471, 813 NYS2d 691, *cert dismissed* 548 US 940, 127 S Ct 34 [2006]; ***Matter of Diamond Waterproofing Sys. v 55 Liberty Owners Corp.***, 4 NY3d 247, 793 NYS2d 831 [2005]); nor, in any event, does it appear that this case presents one of the "rare occurrences" of "egregious impropriety" to which the doctrine might otherwise attach (***Wien & Malkin v Helmsley-Spear, Inc.***, *supra* at 480, 813 NYS2d at 696). Insofar as ICA argues that the arbitrator's failure to enforce the release was irrational and gave the provisions in the parties' other agreements an irrational construction (*see generally* ***Matter of Rockland County Bd. of Coop. Educ. Servs. v BOCES Staff Assn.***, 308 AD2d 452, 764 NYS2d 118 [2003]), it is evident that the arbitrator could rationally have concluded, based on the testimony and documentary evidence referenced in Sportime's post-hearing brief, that the deck leaks and sewer pipe problems were not attributable to the subcontractor whose work was the subject of the release and that Sportime's claims relating to those problems did not fall within the scope of the release.

ICA's claim that the arbitrator "conducted inconsistent and disparate treatment" between the parties–which, like the claim of misconduct, is premised on the arbitrator's failure to rule on its motion to dismiss–is similarly rejected for want of a showing of prejudice.

Nor is there a basis for vacating the award on the ground that it was not final and definite. An award is deficient in this regard "only if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy" (***Matter of Meisels v Uhr***, 79 NY2d 526, 536, 583 NYS2d 951, 955 [1992]). Here, the controversy between the parties was expressly defined by their respective claims and counterclaims. The award, which provides for a fixed sum to be paid in resolution of those claims and counterclaims, resolved the controversy. Even if, as ICA contends, the award did not employ the form or detail requested by the parties, this does not constitute a basis to vacate it (*see* ***Matter of RRN Assoc. [DAK Elec. Contr. Corp.]***, 224 AD2d 250, 637 NYS2d 409 [1996]; ***Matter of Central Queens Young Mens/Young Womens Hebrew Assn. [Johansen & Bhavnani, Architects–Rubsamen Co.]***, 161 AD2d 337, 555 NYS2d 96 [1990]). Likewise, even if the arbitrator failed to consider or appreciate certain evidence–as here, the canceled checks relative to the leak claims–vacatur would not be warranted (*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]). As to ICA's claims regarding the alleged irrationality of the award, the court notes, relative to payment application 29, that an arbitrator need not specify the formula used in calculating an award (*see* ***Matter of Salco Constr. Co. v Lasberg Constr.***

Assoc., 249 AD2d 309, 671 NYS2d 289 [1998]); as to those portions of the award denying its counterclaims for additional design builder's fees, the court finds ample support–again, in the testimony and documentary evidence referenced in Sportime's post-hearing brief–for the finding that ICA was not entitled to any such fees. Notably, an arbitrator will not be deemed to have acted irrationally "unless there is *no proof whatever* to justify the award" (***Matter of Peckerman v D & D Assoc.***, 165 AD2d 289, 296, 567 NYS2d 416, 420 [1991] [emphasis added]).

The court further rejects ICA's claim that it was denied due process and deprived of a fair hearing. ICA's claim is based, in part, on an alleged statement made by the arbitrator during the hearing that he would limit himself to 15 hours to review the testimony and exhibits and that, as a result, he would not review certain exhibits. Even assuming that such a statement necessarily implicates due process or the right to a fair hearing, ICA failed to demonstrate that the arbitrator did, in fact, limit his review or refuse to consider exhibits. ICA also contends that it was placed at a severe tactical and strategical disadvantage following a last-minute change of protocol initiated by the arbitrator requiring ICA to create, jointly with Sportime, a series of "bucket tables" organizing ICA's claims for certain design builder's fees by invoice and category of work, as a result of which ICA was required to restructure its exhibits and change the order of its testimony. However, apart from the additional work this entailed, ICA has failed to demonstrate either how it was prejudiced by the procedure, or that whatever disadvantage may have inured to it by its adherence to the procedure did not also inure to Sportime. The court notes, moreover, that where, as here, parties voluntarily participate in an arbitration, only certain minimums of procedural due process pertaining to the presentation of evidence are guaranteed, namely, the right to be heard, to present evidence, and to cross-examine witnesses (*see* CPLR 7506 [c]; *see also* ***Sawtelle v Waddell & Reed***, 304 AD2d 103, 754 NYS2d 264 [2003]); ICA acknowledges that, on the last day of the hearing, it cross-examined the Sportime witnesses and presented its own witness to testify about the "bucket tables."

As to any and all remaining objections by ICA relative to the award not previously addressed in this decision, the court has considered those objections and finds them without merit.

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 petition is granted to the extent of confirming the award and directing the entry of judgment thereon.

However, as to Sportime's request for an award of the additional attorney's fees which it incurred in connection with this special proceeding to confirm the arbitration award, the petition is denied. Absent an agreement between the parties, statute or court rule, a civil litigant cannot recover its attorney's fees (*see* ***Hooper Assoc. v AGS Computers***, 74 NY2d 487, 549 NYS2d 365 [1989]). While the parties' agreement does provide that the prevailing party "in any arbitration, or any other final, binding dispute proceeding upon which the parties may agree, shall be entitled to recover from the other party reasonable attorneys' fees" (*see also* CPLR 7513), it does not provide for attorney's fees incurred in the conduct of judicial proceedings (*cf.* ***Matter of New York Merchants Protective Co. v RW Adart***

Poly, 108 AD3d 554, 968 NYS2d 552 [2013]; *cf. also* General Business Law § 198-a [l]). Consequently, Sportime is not entitled to the requested award, notwithstanding that this proceeding arises from the arbitration. And insofar as a portion of the fees which Sportime now seeks to recover were incurred in drafting its attorney's affirmation in support of its request–*i.e.*, "fees on fees"–the court would be without authority to grant recovery in any event (*see* ***Sage Realty Corp. v Proskauer Rose***, 288 AD2d 14, 732 NYS2d 162 [2001], *lv denied* 97 NY2d 608, 739 NYS2d 98 [2002]).

Submit order and judgment (one paper).

J.S.C. 9/23/13