Matter of Consolidated Commercial Workers of Am. v Excelsior Packaging Group, Inc.
2013 NY Slip Op 33184(U)
July 31, 2013
Sup Ct, Queens County
Docket Number: 700993/2013
Judge: Jeffrey D. Lebowitz
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ORIGINAL

MEMORANDUM

SUPREME COURT, QUEENS COUNTY IAS PART 16

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In the Matter of the Arbitration of
Certain Controversies Between

Index No.: ~~16086/07~~ 700993/13

CONSOLIDATED COMMERCIAL WORKERS OF AMERICA, LOCAL NO. 528, affiliated With NOITU-IUJAT,

Petitioner,

BY: **LEBOWITZ, J.**

Motion Date: 6/24/13
Motion Cal. No.: 147
Motion Sequence No.:2

-against-

EXCELSIOR PACKAGING GROUP, INC.,

Respondent.

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The following papers numbered 1 to 9 read on this petition to confirm of the arbitration award, and cross petition of the respondent seeking to vacate said award.

	PAPERS NUMBERED
Notice of Petition-Petition-Exhibits-Service.....	1 - 4
Notice of Cross Petition.....	5
Affirmation in Opposition and in Support of Cross Petition-Exhibits.....	6 - 7
Memorandum of Law.....	8
Reply Affirmation.....	9

FILED
AUG - 5 2013
COUNTY CLERK
QUEENS COUNTY

The Petitioner having moved for an Order pursuant to CPLR §7510 confirming an arbitration award, and pursuant to CPLR §7514 rendering judgment thereon. Respondent having submitted a cross petition seeking an order, pursuant to CPLR §7511, vacating the arbitration award.

The Petitioner and Respondent entered into a Collective Bargaining Agreement ("CBA") on or about May 24, 2012. Pursuant to Article VIII of said Agreement, any claim arising out of said CBA shall be settled by binding arbitration.

A dispute arose between the parties as to whether Respondent, Excelsior, violated Section XIII of the Agreement by changing a portion of the lunch period from paid to unpaid. Pursuant to the Agreement, the parties submitted to arbitration, which hearing was held on January 22, 2013. The Arbitrator rendered a Decision dated February 7, 2013 and found in favor of the Petitioner. Petitioner now moves for an Order confirming said award.

Respondent cross moves for an Order vacating the award on the grounds that the Arbitrator denied it's counsel request for an adjournment and proceeded on the hearing date without Respondent or its counsel present.

Specifically, the arbitration hearing was initially scheduled for October 29, 2012 but was adjourned due to Hurricane Sandy. On January 2, 2013 the Arbitrator faxed to counsel for both parties proposed hearing dates of January 17th or January 19th. Petitioner's counsel responded they were available on January 17th, however Respondent's counsel did not respond to that fax.

The Arbitrator tried, unsuccessfully, to reach Respondent's counsel by phone. On January 11, 2013 the Arbitrator emailed Respondent's counsel inquiring if he was available on the proposed dates. Excelsior's counsel responded to that email stating he was out of the office and would contact the Arbitrator on Monday, January 14, 2013. Counsel never contacted the Arbitrator on January 14, 2013.

On January 15th and January 16th, the Arbitrator again tried to contact counsel for Excelsior but was unable to reach him and left messages for him.

The Arbitrator, on January 17th sent written notice to both parties scheduling the hearing for January 22, 2013. On January 19th, Respondent's counsel wrote to the Arbitrator, via facsimile, and requested an adjournment stating that the office is not available to attend a hearing on January 22, 2013 "as we are otherwise engaged", and stated that they would provide alternate available dates under separate cover. On January 21st the Arbitrator faxed a denial of said request to counsel. In response to that fax, Respondent's counsel wrote to the Arbitrator asking that he reconsider his denial as his office was scheduled to appear in Federal Court at the same time as the hearing herein.

On January 22, 2013, the day of the hearing, the Respondent's counsel again faxed the Arbitrator stating that they had not received any response to their letter dated January 21st, and that "we take your silence on our request for an adjournment as consent".

The hearing proceeded on January 22, 2013 without the presence of the Respondent or its counsel. However, it is noted that on the day of the hearing the Petitioner contacted Mr. Shemash, a representative of Excelsior, and advised him that the hearing was going forward. Mr. Shemash was informed that he had the opportunity to appear and participate in the proceeding. However, no one from Respondent's company appeared.

The Arbitrator rendered his Decision on February 7, 2013 in favor of the Petitioner. On February 8, 2013, Respondent wrote to the Arbitrator and requested the Arbitrator to vacate his award and schedule a new hearing. The Arbitrator declined by letter dated February 16, 2013.

Petitioner now seeks to confirm said award. Respondent opposes and cross moves to vacate the same arguing, *inter alia*, that the arbitrator's refusal to grant Respondent an adjournment resulted in precluding the Respondent from offering evidence and testimony, and constitutes misconduct within the meaning of CPLR §7511(b)(1).

Respondent analogizes the Arbitrator's decision to a default judgment and argues that public policy mandates vacatur of the award. If this Court were to entertain Respondent's contention, it is well settled that in order to vacate a default judgment, the moving party must establish that (1) there is a reasonable excuse for the default, and (2) there exists a meritorious defense to the action. *(See,* Tepper *v* Furino, 239 AD2d 405). The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court and the movant must submit supporting facts in evidentiary form sufficient to justify the default. (*See,* Bardales v. Blades, 191 AD2d 667).

While the Respondent herein attached copies of two letters sent via facsimile to the Arbitrator requesting an adjournment, it is noted that there is no indication that counsel made any other efforts to either have an attorney cover this case, or the case in Federal Court. The first letter states Respondent will provide alternate dates under separate cover, but no proof of same is submitted herein. It appears, from January 2, 2013 up until the eve of the hearing Respondent's counsel did not respond to the Arbitrator's telephone calls, correspondence or emails, with the exception of the email advising he was out of the office and would call on January 14, 2013, which he in fact never did. Further counsel's assumption that silence on the part of the Arbitrator was equivalent to the granting of an adjournment does not make sense, nor constitutes a reasonable excuse.

In light of the Respondent's failure to demonstrate a reasonable excuse that would warrant the vacatur of a default judgment, the Court need not consider whether Respondent has demonstrated the existence of a meritorious defense. *(See,* Development Strategies Company, LLC Profit Sharing Plan v. Astoria Equities, Inc. 71 A.D.3d 628 [2nd Dept. 2010]). The Court notes however, that the Respondent has not submitted any affidavits or evidence in support of a meritorious defense.

Respondent also states that the actions of the Arbitrator herein, to wit: denying their counsel's request for an adjournment, constitutes misconduct pursuant to CPLR §7511(b)(1)(i), and that said actions exceeded the Arbitrator's power which precluded Respondent from offering any evidence at the hearing . [CPLR §7511(b)(1)(iii)].

CPLR §7506(b) authorizes an Arbitrator to appoint a time and place for the hearing, and adjourn or postpone the hearing. In the event a party fails to appear, the Arbitrator is authorized to hear and determine the controversy upon the evidence produced at the hearing.

Petitioner argues that the Arbitrator herein did not exceed or improperly use his statutorily provided power in denying the Respondent's request for adjournment and proceeding with the hearing without Respondent or its counsel present.

In their reply Respondent argues that while the Arbitrator's actions were clearly authorized, the Arbitrator's refusal to adjourn and failure to respond to Respondent's telephone messages was arbitrary and capricious. The Court notes that in the initial Petition to vacate the award, Respondent relied on the theories of misconduct and abuse of discretion. In reply, a new argument characterizing the Arbitrator's actions as arbitrary and capricious are introduced.

Respondent's attempt to place fault on the Arbitrator for not returning telephone calls, and Respondent's assumption that the Arbitrator's silence was in fact consent to an adjournment, is capricious in and of itself.

The documents submitted herein outline the Arbitrator's efforts to arrange a mutually convenient date for the hearing. The documents further indicate that despite Respondent's representations that he would call back (i.e. on Monday, January 14, 2013), and that he would provide alternate dates, he did not. In fact, according to letters sent by the Arbitrator, it was Respondent's counsel who failed to return numerous telephone messages.

It is clear that the burden of the party seeking to vacate an arbitration award is to demonstrate, by clear and convincing proof, that the arbitrator has abused his discretion in such a manner so as to constitute misconduct. (*See*, Matter of Herskovitz v. L.P. Kaye Associates, Ltd., 170 A.D.2d 272, 274). The Court finds that based on the foregoing, the Respondent has not met that burden

Specifically, the cases upon which Respondent relies are inapposite to the facts of this case. In the Matter of Bevona v. Superior Maintenance Co., 204 AD2d 136, the adjournment was requested for a continued hearing date due to a death in counsel's family. In Insurance Company of North America v. St. Paul Fire & Marine Insurance Company, 215 AD2d 386, the court found that the arbitrator abused his discretion in refusing to adjourn the hearing due to the unavailability of the fire marshal investigator to appear because of a pending criminal investigation. The facts in Omega Contracting Inc., v. Maropaks Contracting Inc., 160 AD2d 942, show that on the second day of the arbitration hearing the arbitrator, after petitioner rested, denied request of appellant's counsel for an adjournment where it was subsequently learned that counsel failed to appear due to a medical emergency involving his daughter. Lastly, in Griffin v. Ayash, 125 AD2d 226, the Appellate Division held that the Special Term erred in granting cross motion to vacate award in that the arbitrator did not abuse its discretion in denying adjournment where there was nothing in the record that there was any actual request submitted, and the respondents should not benefit from their own failure to appear.

The contumacious conduct of the Respondent's counsel of not responding to the Arbitrator's messages, and not appearing at the hearing despite the fact that the Arbitrator never granted the request for an adjournment, does not support their argument that the the Arbitrator's actions were an abuse of discretion.

Accordingly, the Petition to confirm the arbitration award is hereby granted.

The cross petition to vacate the arbitration award is hereby denied.

Submit Judgment

Dated: July 31, 2013

JEFFREY D. LEBOWITZ, J.S.C.