

**Matter of Duraku v Tishman Speyer Props., LP**

2014 NY Slip Op 31450(U)

June 3, 2014

Supreme Court, New York County

Docket Number: 653545/13

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

In the Matter of the Application of SONIA DURAKU,

-against -

TISHMAN SPEYER PROPERTIES, LP,  
ARBITRATOR SUSAN MACKENZIE,  
and SERVICE EMPLOYEES INTERNATIONAL  
LOCAL 32BJ, as a necessary party,

INDEX NO. 653545/13  
MOTION DATE 04-02-2014  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this petition pursuant to CPLR §7511 to vacate an arbitration award and cross-motion to confirm the arbitration award:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered and adjudged that this petition to vacate an arbitration award, is denied. The Respondent's cross-motion to confirm the arbitration award, is granted, the arbitrator's award is confirmed. The remainder of the motion is denied.

By stipulation dated March 28, 2014, Petitioner has voluntarily discontinued all claims against Respondent, Service Employees International Local 32BJ ("SEIU Local 32BJ").

Petitioner was employed by respondent Tishman Speyer Properties, LP ("Tishman Speyer"), to work as a cleaner and night supervisor to obtain contract sales at 666 Fifth Avenue, New York, New York, from the year 1986 through 2008. Petitioner was also a union supervisor. In April of 2007, Tishman Speyer hired Bill Lee as a night shift supervisor. Petitioner shared her night supervisory duties as a foreperson with Romie Cowart, and both were responsible for reporting directly to Mr. Lee. Petitioner alleges that she was subject to sexual harassment from Mr. Lee throughout 2007. Mr. Lee was fired by Tishman Speyer in November of 2007, because of his comments and treatment of Petitioner and other female cleaners. Petitioner claims that she made complaints about Mr. Lee to Robert Francis the Building Cleaning Supervisor, repeatedly during 2007, but did not file any formal written complaints. Petitioner also claims that in 2007 she was subject to national origin harassment by Romie Cowart derived from comments he made to others referring to her Armenian heritage. Petitioner claims she was subject to various reprimands and suspensions occurring for the first time in 2007, as retaliation for her complaints.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Commencing in early 2008, Petitioner alleges that she was subject to repeated retaliation by Mr. Francis because he was nearly fired for mishandling the harassment situation with Mr. Lee. On October of 2008, Petitioner was removed from all tenant sales functions. In November of 2008, Petitioner was suspended from employment related to the investigation of an incident involving the tape recording of conversations between Petitioner and other female cleaners with Robert Francis. In January of 2009, Petitioner filed an EEOC Complaint through SEIU Local 32BJ and was returned to work as part of a settlement agreement at her full salary, but only as a building cleaner. A supervisory position had been offered to Petitioner as part of the settlement agreement in another building but she rejected it. Petitioner was also provided back pay for the period of her suspension.

Petitioner and two other female cleaners commenced a discrimination action in the Federal Southern District Court. The two other female cleaners both settled their claims with Tishman Speyer. Federal District Judge Denise Cote, directed that arbitration be conducted pursuant to a mandatory arbitration clause in Petitioner's employment contract. On August 1, 2013, the Federal action was dismissed, Federal District Judge Denise Cote relied on a letter dated July 30, 2013, reporting on the status of arbitration of the plaintiff's claims.

On July 15, 2013, after approximately four days of hearings, Respondent, Susan T. Mackenzie, Esq., ("the arbitrator"), rendered an award pursuant to, "Federal Title VII of the Civil Rights Act of 1974, New York State Human Rights Law ("NYSHRL"), New York Executive Law §290 et seq., and New York City Human Rights Law ("NYCHRL"), Administrative Code §8-101 et seq." The arbitration was conducted on the issue of whether Petitioner was discriminated against in her terms and condition of employment because of her national origin and gender, including the creation of a hostile work environment and retaliation for her complaints.

The July 15, 2013 award denied Petitioner's claims of hostile environment and discrimination based on gender and national origin. The arbitrator found that Petitioner failed to make any of her gender based claims known to Tishman Speyer. No formal claims were filed by Petitioner concerning Mr. Lee's behavior with Tishman Speyer. The arbitrator failed to find pervasive harassment based on national origin, stating that upon reprimand there were no further inappropriate statements or comments made by either Mr. Cowart or Mr. Francis. There was no finding of pervasive harassment based on gender because of Petitioner's own contradictory testimony and failure to establish by documentary or other evidence that Mr. Francis was aware of discriminatory conduct by Mr. Lee. The arbitrator found Mr. Francis' testimony, that he was unaware of discriminatory conduct by Mr. Lee, more credible than the Petitioner's testimony.

Petitioner's claims derived from retaliation were denied because all of the sanctions imposed by Tishman Speyer were business determinations related to her own behavior, including penalties related to overtime for which Petitioner was reprimanded starting in 2005. Petitioner was also caught on video surveillance inappropriately accepting gifts from a tenant which resulted in a reprimand. The arbitrator determined that the Petitioner failed to establish that the 2009 demotion was based on retaliation because in December of 2008 as part of the settlement she had been offered the title of foreperson at another building but turned it down. Although the Petitioner was only

offered the position of cleaner in January of 2009, she retained the higher rate of pay and was given back pay for the time period she was suspended.

Petitioner subsequently brought this proceeding pursuant to CPLR §7511 seeking to vacate the July 15, 2013 award and remand the matter for a new hearing, claiming that the arbitrator was biased, exceeded her authority and failed to follow procedure. Tishman Speyer cross-moves to confirm the arbitrator's award and for attorney fees based on frivolous conduct.

Petitioner contends that the award should be vacated on public policy grounds because it conflicts with established Title VII, NYSHRL and NYCHRL standards and prohibitions. Petitioner claims the arbitrator was biased because of the refusal to enforce basic human rights and Mr. Lee had admitted to the harassment. Pursuant to the testimony provided, Petitioner contends there was no way that Mr. Francis or Tishman Speyer were unaware of the harassment or hostile work environment.

Respondent opposes the motion to vacate the award because the Petitioner has not in any manner established the arbitrator was biased. Respondent argues that Petitioner merely relies on speculative assertions because she did not obtain the result sought and there has been no proof that the award was patently irrational or against public policy.

"It is well settled that judicial review of arbitration awards is extremely limited. An arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached. 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. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one." (Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y. 3d 471, 846 N.E. 2d 1201, 813 N.Y.S. 2d 691 [2006]). The Court's authority to overturn arbitration awards on public policy grounds is narrowly construed as an exception to the general rule that an arbitrator has broad powers to determine all disputes derived from the parties' contracts that are submitted to them (Board of Educ. Of City of N.Y. v. Herschkowitz, 308 A.D. 2d 334, 764 N.Y.S. 2d 254 [N.Y.A.D. 1<sup>st</sup> Dept., 2003]).

It therefore follows that a court should not vacate an award because it does not agree with the result arrived at by the arbitrator. However, when there is ambiguity, uncertainty, irrationality, lack of clarity and definition, the award should be vacated and remanded to the arbitrator for clarification.

Petitioner argues that the arbitrator failed to make determinations under the NYCHRL, which has a more heightened standard than that of the NYSHRL and the Federal Title VII. The failure to properly apply NYCHRL is against public policy and is a basis to vacate the arbitrator's award.

Respondent contends that the arbitrator did address the standard applicable under NYCHRL pursuant to cited Federal caselaw, but did not provide specific details of

its application. Respondent contends that to the extent the NYCHRL standard was not properly applied the arbitrator can make errors of law in the award.

The defendant can prevail in a claim of discrimination by demonstrating that the plaintiff cannot establish every element of intentional discrimination or by introducing evidence of nondiscriminatory, legitimate reasons to support its employment decisions (Ferrante v. American Lung Association, 90 N.Y. 2d 623, 687 N.E. 2d 1308, 665 N.Y.S. 2d 25 [1997], Mittl v. New York State Division of Human Rights, 100 N.Y. 2d 326, 794 N.E.2d 660, 763 N.Y.S. 2d 518 [2003] and Forrest v. Jewish Guild for the Blind, 3 N.Y. 3d 295, 819 N.E. 2d 998, 786 N.Y.S. 2d 382 [2004]).

A claim of harassment under the NYCHRL requires the plaintiff to establish, (1) she belongs to a protected group; (2) she was subject to unwelcome harassment and (3) the complained of the harassment. A complaint of harassment under the NYSHRL has the same requirements under NYCHRL but is less restrictive (Williams v. New York City Housing Authority, 61 A.D. 3d 62, 872 N.Y.S. 2d 27 [2009]). Pursuant to the NYCHRL the conduct involved has to have altered the conditions of employment creating a hostile or abusive environment as perceived subjectively by the plaintiff, but also requires a potentially similar finding by a reasonable person (Ferrer v. New York State Division of Human Rights, 82 A.D. 3d 431, 918 N.Y.S. 2d 405 [N.Y.A.D. 1<sup>st</sup> Dept., 2011]).

A transfer that changes the nature of duties but does not otherwise alter the salary, condition or terms of employment is not an adverse employment action, it is only an alteration of responsibilities. Reprimands and excessive scrutiny without other negative results such as a decrease in salary or probation is not an adverse employment action. Negative evaluations that do not result in any reduction of pay or privileges fail to support a claim of discrimination (Mejia v Roosevelt Island Medical Associates, 95 AD 3d 570, 944 N.Y.S. 2d 521 [NYAD 1<sup>st</sup> Dept., 2012]) .

The defendants can prove their case on retaliation by introducing evidence of nondiscriminatory, legitimate reasons to support their employment decisions and establish the lack of material issues of fact as to pretext. A plaintiff's prima facie case of retaliation requires evidence of a subjective retaliatory motive and that the conduct was reasonably likely to deter an individual from engaging in protected activity (Williams v. City of New York, 38 A.D. 3d 238, 831 N.Y.S. 2d 156 [N.Y.A.D. 1<sup>st</sup> Dept., 2007] and Williams v. New York City Housing Authority, 61 A.D. 3d 62, supra).

The arbitrator heard testimony and determined that a reasonable person would not find the Petitioner was harassed or discriminated against. The arbitrator's decision found that Petitioner did not state a basis for her claim under the Federal Title VII , NYSHRL or NYCHRL, because although a member of the protected class, she failed to establish that she was treated less well by Tishman Speyer based on her gender or national origin. Although NYCHRL has a higher standard than the NYSHRL and Federal Title VII, the arbitrator did address NYCHRL and merely failed to state the details of that determination in the award. Petitioner fails to establish that the determination was biased, irrational, or against public policy.

Tishman Speyer argues that Petitioner is collaterally estopped from asserting claims in this proceeding because of the determinations made in the Federal action.

Tishman Speyer argues that any objections to the arbitrator's award could have been raised in the Federal action.

Collateral estoppel applies only to identical issues decided in a prior action that are decisive of the action presently before the Court. The party seeking the benefit of collateral estoppel must establish, "...the identity of the issues in the present litigation and the prior determination." To defeat a claim of collateral estoppel a party must establish that the prior action resulted in, "the absence of a full and fair opportunity to litigate the issue" (*Simmons-Grant v. Quinn Emanuel Urquhart & Sullivan, LLP.*, 116 A.D. 3d 134, 981 N.Y.S. 2d 89 [N.Y.A.D. 1<sup>st</sup> Dept., 2014] citing to *Kaufman v. Eli Lilly & Co.*, 65 N.Y. 2d 449, 482 N.E. 2d 63, 492 N.Y.S. 2d 584 [1985]).

The Federal action sought a determination of employment discrimination but was dismissed pursuant to the terms of the employment agreement requiring arbitration of the dispute. The dismissal of the Federal action, was entered because of the rendering of an arbitrator's award, and not on the merits of Petitioner's claim. Tishman Speyer has not established the Federal District Court action provided a full and fair opportunity to litigate the issue in this proceeding, which was brought to vacate the arbitration award.

Frivolity as defined by 22 NYCRR 130-1.1, requires conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party.

Respondent has failed to state a basis for an award of sanctions and attorneys fees based on frivolous conduct. Petitioner relied on the standard utilized in a typical application for discrimination and harassment under the NYCHRL. It was not apparent to their counsel that a different standard should be applied to the arbitrator's decision.

Accordingly, it is hereby ORDERED and ADJUDGED that the petition to vacate the arbitrator's award is denied; and it is further,

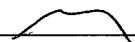
ORDERED and ADJUDGED that the cross-motion to confirm the award is granted, the arbitrator's award is confirmed, and it is further,

ORDERED that the remainder of the cross-motion is denied, and it is further,

ORDERED that the Clerk is Directed to enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ  
J.S.C.

  
\_\_\_\_\_  
MANUEL J. MENDEZ,  
J.S.C.

Dated: June 3, 2014

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                       REFERENCE