Matter of McNamara v Edwards
2016 NY Slip Op 32199(U)
September 19, 2016
Supreme Court, Suffolk County
Docket Number: 03352/2016
Judge: William G. Ford

[* 1]

SHORT FORM ORDER **INDEX NO. 03352/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
Supreme Court Justice

In the Matter of the Application of

ROBERT MACNAMARA & KIMBERLY MCNAMARA,

Petitioners,

For a Judgment Pursuant to Article 75 of the New York Civil Practice Law & Rules

-against-

JEFFREY EDWARDS & WOODBURY NASSAU BUILDERS CONSULTING CORP.,

Respondents.

MOTION DATE: 05/27/2012
ADJOURN DATE: 06/16/2016
MOTION SEQ#: 001 MD; CASE DISP-

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Upon the following papers numbered read on this Article 75 proceeding to Vacate an Arbitration Award; Notice of Petition, Verified Petition, Memorandum of Law in Support dated March 22, 2016 and supporting papers; Affirmation in Opposition by Frederick P. Stern, Esq. dated June 15, 2016; and Reply Affirmation in Further Support of the Petition by John J. Caravella, Esq. dated July 13, 2016; (~~and after hearing counsel in support and opposed to the motion~~); it is

ORDERED that the Petition is **DENIED** for the reasons that follow.

Factual Background & Procedural History

This proceeding was brought by petitioners John McNamara and his wife Kimberly McNamara ("petitioners") pursuant to CPLR Article 7511 to vacate an arbitration award. Petitioners brought the proceeding against respondents Jeffrey Edwards and Woodbury Nassau Builders Consulting Corp. ("respondents"). The dispute arises from a home improvement construction contract entered into between the parties on December 3, 2013, whereby respondents agreed to renovate, rehabilitate, rebuild or expand the petitioners' home located at 86 1st Street, Ronkonkoma, New York 11779. The agreement called for the anticipated work to be complete within 8 months, time of the essence, on or before June 1, 2014. Petitioners agreed to pay respondents and in fact rendered payment of $163,874.04 for the anticipated work.

Unbeknownst to petitioners, respondents were not licensed as required by Suffolk County Code §§ 517 & 563-3 for home improvement within the County of Suffolk. Petitioners allege that respondents did not complete the contracted for work in a timely manner by the performance date called for in their agreement, and that what work was completed was done in a shoddy or unworkmanlike manner. Further petitioners claim that the resulting work left their garage and shed damaged, caused an air leak in the basement and foundation of their home, did not properly repair their chimney in a manner to pass town inspection, and failed to issue a requisite certificate of occupancy.

Petitioner filed administrative complaints based on respondents' unlicensed status with the Suffolk County Office of Consumer Affairs and the New York State Attorney General's Office. Suffolk County assessed code violations and fines totaling $1,500 against respondents in a decision dated June 2015.

As a result, petitioners sought to arbitrate their dispute pursuant to their contract against respondents before the American Arbitration Association with Arbitrator Ira M. Schulman presiding. In those proceedings, petitioner sought repayment of $73,863.50 representing damages to recompense for the alleged deficient and incomplete performance on respondents' part. Respondents counterclaimed seeking payment of $29,000.00 representing an unpaid balance on the home improvement contract.

After petitioner presented both lay and expert testimony and exhibits, Arbitrator Schulman determined the matter in a ruling dated January 20, 2016 denying petitioner's any monetary relief finding insufficient proof of damages to their garage or shed, and further denying respondents' counterclaim based on their unlicensed status. The decision went on further finding that neither party lived up to their respective obligations called for in their agreement and thus each party was returned to the status quo. The arbitrator also completely discounted petitioners' expert testimony finding him to lack competency as regarding foundation waterproofing requirements. The decision also observed that respondents had exhibited ineffective supervision of subcontractors.

Summary of the Parties' Positions

In the wake of the decision, petitioners brought this proceeding seeking to vacate the award and remand for further proceedings. Petitioners make this application on the basis that the award violates public policy and was irrational or unsupported by fact or law. They argue that municipal regulation exists to prohibit respondents' unscrupulous conduct in attempting home improvement work without a license and that the arbitrator's ruling flew in the face of explicitly stated consumer protection legislative intent, creating a perverse incentive to break the law.

Further, petitioners suggest that the arbitrator exceeded his authority in reforming the parties' construction agreement by ignoring the time of the essence language.

In opposition to the Petition, respondents argue that despite respondents having been unlicensed for home improvement, they hired subcontractors who were. They also state that the anticipated work under the agreement was substantially completed. Respondents further contended that the basement leaks were not as substantial as petitioners claim and that the parties reached their own separate agreement to repair the shed and garage at respondents' expense.

Respondents argue for denial of the Petition because to the extent that petitioner expended monies for illegal or noncompliant home improvement, since respondent was unable to recover any affirmative relief or monies, petitioners should not be able to utilize consumer affairs home improvement regulation as a sword for affirmative relief. Following this point, respondents urge complete denial of any monetary relief to petitioners since they believe that the money sought constitutes a complete refund on a substantially completed project.

Discussion

At the outset, the Court is mindful that in a matter such as this our state's appellate courts have cautioned that [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. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (***Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York***, 94 NY2d 321, 326, 704 NYS2d 910, *Matter of Town of Haverstraw*, 65 NY2d 677, 678, 491 NYS2d 616; ***Matter of Sprinzen***, 46 NY2d 623, 629, 415 NYS2d 974; ***Tsikitas v. Nationwide Ins. Co.***, 33 AD3d 928, 929, 822 NYS2d 464 [2d Dept. 2006]). [J]udicial intervention on public policy grounds constitutes a narrow exception to the otherwise broad power of parties to agree to arbitrate all of the disputes arising out of their juridical relationships, and the correlative, expansive power of arbitrators to fashion fair determinations of the parties' rights and remedies (***New York City Transit Auth. v. Transp. Workers Union of Am., Local 100, AFL-CIO***, 99 NY2d 1, 6–7 [2002]).

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. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice ... courts may vacate arbitral awards in some limited circumstances ... when it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power under CPLR 7511(b)(1) (***Matter of Board of Educ. v. Arlington Teachers Assn.***, 78 NY2d 33, 37, 571 N.Y.S.2d 425 [internal citations omitted]).

"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 arbitrators' power. An award made by an arbitration panel will not be vacated for errors of law or fact committed by the arbitrators unless the award exhibits a manifest disregard of the law" (***DeRaffele Mfg. Co. v. Kaloakas Mgmt. Corp.***, 48 A.D.3d 807, 808–09, 852 N.Y.S.2d 390, 391–92 [2d Dept. 2008]).

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, or unless the rights of a party were prejudiced by the partiality of an arbitrator (***Cifuentes v. Rose & Thistle, Ltd.***, 32 AD3d 816, 821 NYS2d 622, 623 [2d Dept. 2006]). An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached' " (***Sheriff Officers Ass'n, Inc., ex rel. Ranieri v. Nassau Cty.***, 113 AD3d 620, 621, 979 NYS2d 89, 91 [2d Dept. 2014]).

An arbitrator exceeds his or her power under CPLR 7511(b)(1)(iii) if the award "g[ives] a completely irrational construction to the provisions in dispute and, in effect, ma[kes] a new

contract for the parties" (***Steinberg v. Novitt & Sahr***, 54 AD3d 1043, 1044, 863 NYS2d 919 [2d Dept. 2008]). Arbitration awards may not be vacated even if the court concludes that the arbitrator's interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on his power (***In re Wicks Constr., Inc.***, 295 AD2d 527, 528, 744 NYS2d 452, 454 [2d Dept. 2002]).

The established law of the Second Department is clear that a home improvement contractor who is unlicensed at the time of the performance of the work for which he or she seeks compensation forfeits the right to recover damages based on either breach of contract or quantum meruit (***Flax v. Hommel***, 40 AD3d 809, 810, 835 NYS2d 735, 736 [2d Dept. 2007]; *accord* ***Emergency Restoration Servs. Corp. v. Corrado***, 109 AD3d 576, 577, 970 NYS2d 806, 807 [2d Dept. 2013][applying Suffolk County Code regulating unlicensed home improvement]; ***Racwell Const., LLC v. Manfredi***, 61 AD3d 731, 732–33, 878 NYS2d 369, 371 [2d Dept. 2009][Westchester County]). Pursuant to CPLR 3015(e), a complaint that seeks to recover damages for breach of a home improvement contract or to recover in quantum meruit for home improvement services is subject to dismissal ... if it does not allege compliance with the licensing requirement" (***CMC Quality Concrete III, LLC v. Indriolo***, 95 AD3d 924, 925–26, 944 NYS2d 253, 254–55 [2d Dept. 2012]).

Generally speaking the law of this department recognizes that a homeowner may seek restitution for payments actually made for work which was not performed or for defective work (***Brite-N-Up, Inc. v. Reno***, 7 AD3d 656, 657, 776 NYS2d 839, 840 [2d Dept. 2004]; ***Goldstein v. Gerbano***, 158 A.D.2d 671, 552 N.Y.S.2d 44, 45 [2d Dept. 1990][plaintiffs were entitled to rescind the contracts and to recover the amounts designated in the judgment as a result of the defendant's failure to perform]; ***Segrete v. Zimmerman***, 67 AD2d 999, 1000, 413 NYS2d 732, 733 [2d Dept. 1979]; *compare with* ***Sutton v. Ohrbach***, 198 AD2d 144, 144, 603 NYS2d 857, 857 [1st Dept. 1993][plaintiff may not use the statute as a sword to recoup monies already paid in exchange for the purportedly unlicensed services]).

Here, the arbitration award clearly recognized that it was undisputed between the parties in their dispute that respondents were not licensed at the time of entering into the construction agreement and when respondent performed by making renovation and repairs. In accordance with well settled precedent, the arbitrator correctly denied respondents any affirmative monetary relief by dismissing their counterclaim.

Additionally, the arbitrator did not so misconstrue the parties' contract or reform it as petitioners imply, as to exceed his authority. Rather, the arbitrator appears to have followed the evidence presented in casting aside petitioners' insistence on time being of the essence, given that the Suffolk County Consumer Affairs decision petitioners relied upon in bringing the proceeding itself dismissed any code violation based on this ground. *See* Ver. Pet., Ex. 6.

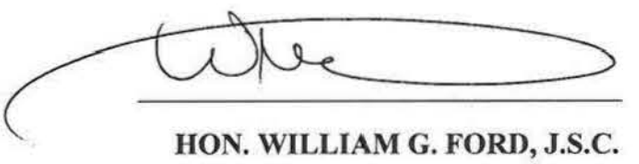
Moreover, while case law exists which supports a homeowner seeking a monetary remedy as against an unlicensed home improvement contractor, it is similarly clear that those circumstances are warranted for the costs associated to cover, i.e. costs incurred by the homeowner for remediating or substitutionary performance (***See e.g. Maltese, Joseph & Porgia v New England Contractors***, 17 Misc.3d 1134(A), *3 [Sup, Ct., Kings Co. 2007][plaintiff homeowner parties to home improvement project may recover against unlicensed contractor upon presentation of evidence of out of pocket losses due to the failure to perform under the contract]).

The record assembled by the parties' submissions supports a finding that the arbitrator had before him and thoroughly considered or discounted as he saw fit lay and expert testimony concerning respondents' performance of its repairs, renovations or rehabilitations at petitioners'' home. Thus it is not a fair characterization of the arbitral award to say that petitioner was denied the benefits and protections of Suffolk County's home improvement consumer protection legislation. To the contrary, the record supports a finding that petitioners had a full and fair opportunity to present testimony and evidence that they did not receive the benefit of their bargain: a complete, thorough or adequate home improvement project. Those arguments were considered and denied by the arbitrator, having the benefit of full participation of the parties. It is entirely possible that the arbitrator in addition to finding petitioners' proof of damages lacking, also did not find any persuasive proof of costs to cover for substitutionary performance on petitioenrs' part. The record is not entirely clear on this point, however it being petitioners' burden, this Court does not find it to have been sufficiently carried or demonstrated by the movant. Petitoners' have not included any corroborative proof of their out of pocket losses as regards their shed, garage or basement foundation in support of this application. Also missing from the parties' submission is any suggestion that these figures were duly presented at arbitration. Thus this Court does not find that adequate grounds support granting of the Petition based on the standard set forth above.

Accordingly, the Petition is **DENIED** in its entirety.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 19, 2016



HON. WILLIAM G. FORD, J.S.C.

__X__ FINAL DISPOSITION **____ NON-FINAL DISPOSITION**