

Matter of Sayre v Madison Hawk Partner, LLC

2018 NY Slip Op 33030(U)

November 28, 2018

Supreme Court, New York County

Docket Number: 654485/2018

Judge: Andrea Masley

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NYSCEF DOC. NO. 69
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

RECEIVED NYSCEF: 11/30/2018

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In the Matter of the Arbitration of

BRUCE SAYRE, INDIVIDUALLY and as TRUSTEE
OF THE BRUCE SAYRE TRUST,
and SAYRE AUCTIONS, LLC,

Index No. 654485/2018
Justice Andrea Masley

Petitioners,

- against -

MADISON HAWK PARTNER, LLC, MADISON
HAWK REALTY GROUP, LLC, JEFFREY
HUBBARD, KATHLEEN DECOSTE, CHRISTIAN
KOULICHKOV, MANHATTAN LIQUID
RESOURCES LLC NO. 2 and IGOR KOULICHKOV,

Respondents.
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Hon. Andrea Masley:

Petitioners timely initiated this special proceeding pursuant to CPLR 7510 to confirm a AAA decision of August 7, 2018 awarding petitioners over \$1.1 million (the Award). Respondents cross petition pursuant to CPLR 7511 to vacate the Award.

Pursuant to CPLR 7511(b)(1)(ii), an arbitration award should be vacated if one party was prejudiced by "partiality of an arbitrator appointed as a neutral."

Petitioners initiated the arbitration on June 7, 2017. On March 12, 2018, petitioners advised the arbitrator that respondents failed to pay the AAA fees, compelling petitioner to pay it. Petitioners argued that respondents failure to pay was contemptuous and requested that the arbitrator consider it as additional evidence of respondents' improper behavior. Subsequently, in a letter to respondents, petitioners offered to pay the fee without informing the arbitrator who paid. Respondents moved to disqualify the arbitrator. AAA's Administrative Review Council rejected respondents' request based on its disqualification rule that provides "that an arbitrator is subject to

disqualification for partiality or lack of independence, inability or refusal to perform his or

her duties with diligence and in good faith, and any ground for disqualification provided by applicable law.” (AAA letter, March 15, 2018.) The hearing proceeded in March and April 2018. The arbitrator awarded attorneys’ fees to petitioners finding respondents’ actions constituted “dilatatory tactic, if not bad faith.”

Respondents insist that the court is compelled to vacate the Award because petitioners’ misconduct compromised the arbitrator’s neutrality and undermined the integrity of the entire proceeding.

As an initial matter, petitioners’ communication was not improper. (See AAA Rule 57 [“a party may request that the arbitrator take specific measures relating to a party’s non-payment”].) Paragraph 19 of the Operating Agreement grants the arbitrator the power to award “attorneys’ fees of a party if the arbitrator expressly determines that the party against whom such award is entered has caused the dispute, controversy or claim to be submitted to arbitration as a dilatatory tactic or in bad faith.” Indeed, respondents requested that the arbitrator award it legal fees.¹ This is not a case of a secret communication with the arbitrator. (See *Kern v 303 E. 57th St. Corp.*, 204 AD2d 152 [1st Dept 1994].)

Respondents have a heavy burden of establishing arbitrator bias by clear and convincing evidence. (*Blumenkopf v Proskauer Rose LLP*, 95 AD3d 647 [1st Dept 2012]; *Matter of Interview, Inc. v Fuller*, 2014 NY Slip Op 32469[U], *12 [Sup Ct, NY County 2014].) Contrary to respondents’ argument, “there is no per se rule that any

¹However, petitioners cite no legal authority for this court to grant its request for fees in this matter. Accordingly, petitioners’ request for fees in filing this petition is denied.

communication with an arbitrator regarding payment of fees impairs the integrity of the arbitration process.” (*Matter of NTSE Communications Inc. v. MCI Worldcom Int'l Inc.*, 17 Misc. 3d 1130 [A], 2007 NY Slip Op 52213 [U], *6 [Sup Ct, NY County 2007] [citation omitted].) Respondents’ reliance on *Ament v Schubert Piano Co*, 172 AD 423 (1st Dept 1916), for this proposition is misplaced since it was decided before the Federal Arbitration Act was enacted in 1925 and long before the public’s enthusiastic support for arbitration.

“Courts have found an appearance of bias where there is evidence that a party was prejudiced or denied a fair hearing as a result of an arbitrator’s knowledge that the party failed to pay its portion of the arbitration fees.” (*Alpha Phone, Inc. v Verizon Services Corp.*, 2009 NY Misc LEXIS 4614, 2009 NY Slip Op 30577[U], *4 [Sup Ct, NY County 2009] [court refused to vacate arbitration award where there was no evidence that the arbitrator was unfair to, bias against or penalized Alpha because petitioner paid Alpha’s portion of the fee].) For example, where the arbitrator barred a party from participating in five days of a seven day hearing, the court found fundamental unfairness and vacated the award. (*Coty Inc. v Anchor Constr.*, 2003 NY Slip Op 50013 [U] [Sup Ct, NY County 2003].) Further, this is not a case where a party could not afford to pay the arbitral fees and is penalized for penurious. (See *Grendi v LNL Constr Mgt Corp*, 175 AD2d 775 [1st Dept 1991].) Otherwise, respondents’ reliance on cases involving improper arbitrator demands for payment is misplaced. (See e.g. *Catalyst Waste-to-Energy Corp. v Long Beach*, 164 AD2d 817 [1st Dept 1990].) There is no suggestion that respondents were denied a full and fair opportunity to be heard. Indeed, the decision is well drafted and well reasoned. The court declines respondents’ invitation to infer bias or a conflict of interest without any evidence. (See

infer partiality without any evidence of actual bias or the appearance of bias, as it will not be inferred from the arbitrator's negative rulings.]

Accordingly, it is hereby

ADJUDGED that the petition is granted, the cross petition is denied, and the award rendered in favor of petitioners and against respondents is confirmed; and it is further

ADJUDGED respondents Madison Hawk Partners, LLC, Jeffrey Hubbard, and Katherine DeCoste shall be jointly and severally liable to pay petitioner Bruce Sayre a total amount of \$ _____, consisting of the following:

- a. \$82,500.00 in contractual damages plus \$17,121.00 of unpaid accrued interest;
- b. \$53,189.10 as prejudgment interest on the contractual damages accruing from February 13, 2014 to June 1, 2018;
- c. further prejudgment interest at a rate of 15% per annum on the contractual damages calculated as \$33.90 per day from June 1, 2018 to the date of this decision, as computed by the Clerk of the Court in the amount of \$ _____;
- d. \$122,428.68 as attorneys' fees;
- e. \$16,928.80 as prejudgment costs and expenses; and it is further

ADJUDGED that respondent Madison Hawk Partners, LLC shall pay petitioners Bruce Sayre and Sayre Auctions a total amount of \$ _____, consisting of the following:

- a. \$549,998.00 in contractual damages for failure to pay "Fixed Fees";
- b. \$112,676.55 as prejudgment interest at the rate of 9% per annum on the contractual damages for failure to pay "Fixed Fees" as of June 1, 2018 (as stipulated);

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c. an additional monthly "Fixed Fee" payment of \$8,333.00 per month from June 1,

2018 to the date of this decision for a total of \$ _____, as computed by the

Clerk of the Court;

d. further prejudgment interest on the damages for failure to pay "Fixed Fees" in the calculated as \$125.34 per day from June 1, 2018 to the date of this decision as

computed by the Clerk of the Court in the amount of \$ _____;

e. \$122,428.68 as attorneys' fees;

f. \$17,815.87 as contractual damages for failure to pay "Business Expenses";

g. \$1,576.01 as prejudgment interest on contractual damages for failure to pay "Business Expenses" as of June 1, 2018;

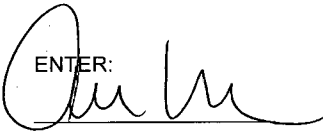
h. further prejudgment interest on the damages for failure to pay "Business Expenses" calculated as \$4.39 per day from June 1, 2018 to the date of this decision as computed by the Clerk of the Court in the amount of \$ _____;

and it further

ADJUDGED that respondents Madison Hawk Partners, LLC, Madison Hawk Realty Group, LLC, Jeffrey Hubbard, Katherine DeCoste, Christian Koulichkov, Manhattan Liquid Resources No. 2, and Igor Koulichkov shall be jointly and severally liable to petitioner Bruce Sayre in the amount of \$27,511.25 in costs advanced to the American Arbitration Association for costs and expenses as well as Arbitrator fees; Petitioners have execution therefor.

Dated: 11/28/18

ENTER:



J.S.C.
HON. ANDREA MASLEY