Lilker Assoc. Consulting Engrs. PC. v Mirrer Yeshiva Cent. Inst. Work Study Program Inc.
2018 NY Slip Op 33324(U)
December 19, 2018
Supreme Court, New York County
Docket Number: 654816/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH — PART IAS MOTION 32
Justice

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LILKER ASSOCIATES CONSULTING ENGINEERS PC,

Petitioner,

- v -

MIRRER YESHIVA CENTRAL INSTITUTE WORK STUDY PROGRAM INC., MIRRER YESHIVA ASSOCIATION INC., both a/k/a MIRRER YESHIVA and a/k/a MIRRER YESHIVA CENTRAL INSTITUTE,

Respondents.

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INDEX NO. 654816/2017
MOTION DATE 12/04/2018
MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for STAY

The motion by respondents for a stay of the arbitration pending a replacement arbitrator is denied.

Background

This proceeding arises out of a dispute concerning the renovation of a rabbinical college operated by respondents in Brooklyn. Petitioner and respondents entered into an agreement where petitioner agreed to provide consulting services to respondent relating to engineering about the proposed renovation. Petitioner alleges that respondents failed to pay it in full. Petitioner initially commenced this action to compel an arbitration before the American Arbitration Association ("AAA"). The Court granted the petition (NYSCEF Doc. No. 26) and the parties proceeded to arbitration.

Respondents now move for a stay of that arbitration on the ground that the arbitrator is biased against them and should be removed. Respondents insist that the AAA-appointed arbitrator ("Hart') failed to reveal his relationship with petitioner. Respondents also contend that Hart has exhibited bias toward respondents. Respondents complain that Hart refused to delay an initial conference to allow respondents to retain an engineer prior to the conference. Respondents also insist that Hart ordered that expert reports were due by April 6, 2018 despite the fact that this was in the middle of Passover. Respondents acknowledge that they timely submitted the expert report but that they were forced to work in violation of Jewish law.

Respondents further complain that when petitioner asked for an adjournment in mid-April 2018, Hart gave a three-week adjournment without any pushback. Respondents detail that they found out that Hart's company (Vidaris) was involved with petitioner in a major construction project from 2014-2017 in Manhattan. Respondents made a motion to disqualify Hart with AAA; that motion was denied. Respondents claim that while their motion to reargue the disqualification motion was pending (it was later denied), Hart had an ex-parte preliminary hearing on only one day notice and issued another scheduling order.

In opposition, petitioner characterizes the instant motion as another attempt by respondents to delay the arbitration. Petitioner emphasizes that there is no evidence that Hart has any personal or direct involvement with petitioner on any matter and, therefore, removing him as arbitrator is not appropriate. Petitioner argues that the project on which Vidaris and petitioner both worked was a large project and there was no evidence that the two entities had direct involvement or collaboration.

Petitioner observes that when respondents stated that they would not be available to conduct the hearing in September due to the Jewish holidays, Hart postponed the hearing until

the last week of October. Petitioner asserts that this demonstrates a complete lack of religious bias by Hart; he moved the hearing based on respondents' religious observance. Petitioner also points out that respondents refused to participate in the arbitration while they tried to disqualify the arbitrator through AAA. Petitioner insists that the conference call held in August 2018 was not an ex-parte hearing that required eight days notice; instead it was a scheduling call that took place over the phone and respondents refused to participate.

Discussion

As an initial matter, the Court finds that the August 2018 scheduling call did not run afoul of CPLR 7506(b) because that provision requires eight days notice before a *hearing*. This was not a hearing; it was a telephone call. Hart's email to the parties states that "We will select dates for the hearing during the call" (NYSCEF Doc. No. 64). Respondents failed to submit any evidence that they told Hart they could not join in the call; it seems that they chose not to participate in order to not prejudice their argument that they objected to the arbitrator. And it would be premature to rule on whether the subsequent scheduling order (NYSCEF Doc. No. 108) has any prejudicial effect on respondents before an award is issued.

"One of the grounds on which to vacate an award is the partiality of the arbitrator—in tripartite arbitration the partiality of the neutral member. Presumably the arbitration forum itself will resolve any problem of partisanship. To the extent that the court is to become involved with the issue at all, its involvement should take place after an award has been made, either upon an application to vacate the award or by way of resisting the winner's effort to confirm it. It has been suggested that the courts may not even have the power to disqualify an arbitrator in advance

of the arbitration proceedings, but in an appropriate case, judicial intervention can probably be secured" (Siegel, NY Prac § 296 at 1162-63 [6th ed 2018]).

Here, the Court finds that there is no basis to remove the arbitrator at this time. As stated above, the general procedure is for parties to wait until an award is issued before they can question an arbitrator's bias with the Court. And respondents tried unsuccessfully to have Hart disqualified by AAA; both their motions to disqualify and to reargue were denied.

Respondents' reliance on *Kern v 303 East 57th St. Corp.* (204 AD2d 152, 611 NYS2d 547 [1st Dept 1994]) for the proposition that a Court can intervene in the middle of an arbitration is misplaced. That case concerned a motion to confirm and a cross-motion to vacate an arbitral award (*id.*). And *Rabinowitz v Olewski* (100 AD2d 539, 473 NYS2d 232 [2d Dept 1984]) is inapposite. There, the Second Department found that plaintiffs did not have to arbitrate their claims with the Diamond Dealers Club, Inc. ("DDC") because an inflammatory letter was passed around the DDC linking plaintiffs with the Palestine Liberation Organization and accusing him of committing crimes (*id.*). There is no evidence that AAA or Hart has done anything approaching the circumstances in *Rabinowitz*.

Instead, it simply appears that respondents simply disagree with Hart's decisions. But that disagreement does not compel the Court to intervene right now. While this Court might have issued a different scheduling order to account for respondents' religious observance of Passover, that does not establish religious bias because, as petitioner points out, Hart later adjourned the hearing until after the Jewish holidays. Respondents' complaints about Hart perfectly illustrate why courts should generally not get involved with arbitration before an award is issued. Respondents are essentially asking this Court to micromanage the discovery process in the arbitration; this Court is not going to do that.

Respondents can raise issues about the arbitration process before the arbitrator and with the forum itself. Respondents apparently did that and were unsuccessful. That does not mean that the Court should get involved. The fact is that the parties were free to agree in their underlying contract that disputes would be litigated in court. But they did not do so; they chose to arbitrate and eventually agreed to Hart as the arbitrator. Going to arbitration does not allow a party to run to Court if an arbitrator issues a scheduling ruling that a party doesn't like.

The alleged relationship between Hart's firm and petitioner was not sufficient for AAA to disqualify Hart and it is not sufficient for this Court either. Hart submitted a letter dated July 12, 2018 in which he stated that he "never worked with Lilker Associates and does not know anyone who works at Lilker" (NYSCEF Doc. No. 100). Hart had Vidaris' finance team search for Lilker and "the search came back with zero results. This means that Vidaris has not been engaged by Lilker, according to our records . . . Considering that I have never worked for or with Lilker, do not know anyone in the firm, and have not had any dealings with them, I am unaware of any actual or potential conflict of interest" (*id.*). The Court is unable to find, based on respondents' vague allegations, that Hart has an impermissible conflict that requires the Court to remove him before an award is issued.

Hart's decision about potentially limiting the damages respondents can seek through their counterclaim is also not a ground to remove him (*see* NYSCEF Doc. No. 98). The Court has no idea what effect, if any, this will have on the ultimate award. It would be inappropriate for the Court to weigh in on a preliminary decision by the arbitrator and it certainly does not establish bias.

While there may be cases where Court intervention prior to the issuance of an arbitral award is necessary, this is not that case. This Court declines to get involved in "he said, he said"

disputes about the arbitral process itself. Disagreements over scheduling happen and the fact that Hart wanted to speed up the process does not establish bias to have him removed at this point. And AAA has already denied respondents' attempts to have Hart removed.

To be clear, the Court is *not* making a definitive finding about Hart's alleged bias. The Court is merely holding that there is no reason to remove Hart as arbitrator based on the papers submitted. It may be that Hart's conduct throughout the rest of the arbitration, including the hearing, could support a claim that he was biased or lacked the requisite impartiality throughout the entire arbitration. If that happens, then respondents are free to raise the issue in connection with challenging the award (assuming, of course, that respondents decide to challenge the award).

Accordingly, it is hereby

ORDERED that the motion by respondents to stay the arbitration is denied.

12·19·18
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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