National Union Fire Ins. Co. Of Pittsburgh, Pa. v Transcanada Energy USA, Inc.
2019 NY Slip Op 31262(U)
May 6, 2019
Supreme Court, New York County
Docket Number: 650515/2010
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **IAS MOTION 12EFM**

Justice

--X

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED, ACE INA INSURANCE, ARCH INSURANCE COMPANY,

Plaintiffs,

- v -

TRANSCANADA ENERGY USA, INC., TC RAVENSWOOD SERVICES CORP.,

Defendants.

--X

INDEX NO. 650515/2010

MOTION DATE ____________

MOTION SEQ. NO. 022

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 022) 781-838 were read on this motion to confirm award.

By order to show case, plaintiffs ACE and Arch move pursuant to CPLR 7510 for an order confirming an arbitration award dated September 21, 2018, staying the accrual of prejudgment interest, and awarding them costs and fees incurred in filing this motion. TransCanada opposes the motion.

I. PERTINENT BACKGROUND

This action, and the companion action under index number 400759/11, concern insurance claims made by TransCanada Energy USA, Inc. and TC Ravenswood Services Corp. (collectively, TransCanada) to ACE, Arch, and other insurance company defendants for damages arising from an incident at TransCanada's Ravenswood, New York power plant. In this action, the insurance companies sought a judgment declaring that they are not obligated to pay the claims, while in the companion case, the claimants seek a declaration of coverage and damages.

By decision and order dated March 2, 2016, TransCanada's motions for partial summary judgment was granted in both actions, and it was awarded a judgment declaring that the insurance policy at issue covered the incident and a claim for loss of capacity sales, and the insurance companies' motion for partial summary judgment seeking a declaration that the lost sales were not covered by the policy was denied. (NYSCEF 783). On September 19, 2017, the decision was affirmed by the Appellate Division, First Department. (153 AD3d 1153).

As of December 2017, the only remaining insurance company defendants are Ace and Arch (collectively, ACE/Arch). (NYSCEF 678).

On March 2, 2018, TransCanada and ACE/Arch stipulated to certain damages, as pertinent here:

> (1) TransCanada's claim for ancillary losses resulting from the incident is $1,429,833, which is inclusive of all claimed ancillary loss, other than prejudgment and postjudgment interest, with the application of any deductible to be determined later; and
>
> (2) TransCanada's claim for energy loss resulting from the incident is $609,683, which is inclusive of all claimed energy revenue loss, other than prejudgment and postjudgment interest, with the application of any deductible to be determined later.

The parties did not, however, agree as to: (1) the amount of the time element deductible; (2) the amount of TransCanada's capacity revenue losses; or (3) the date on which prejudgment interest starts to accrue on a portion of TransCanada's claim. (NYSCEF 785).

By email to the court dated March 29, 2018, counsel for TransCanada advised that:

> The parties have agreed to proceed to binding arbitration in lieu of a jury trial . . . Once the parties receive the arbitrator's ruling, the parties will take appropriate steps to request that a final judgment be entered.

(NYSCEF 787).

On June 27, 2018, in response to the arbitration company's inquiry as to whether the parties had a formal written agreement to arbitrate, TransCanada's counsel wrote, as pertinent

here, that "the Final [arbitration] Award will be included in the damages to be submitted to Judge Jaffe for inclusion in a Final Judgment." (NYSCEF 788).

On September 10, 2018, the parties stipulated to the prejudgment interest, and reserved the other two issues for the arbitration scheduled for September 2018. (NYSCEF 786). The same day, ACE/Arch submitted to the arbitrator their proposed form of award, which incorporated the figures for the ancillary revenue and energy revenue losses stipulated to in the March 2018 stipulation. (NYSCEF 791).

During the arbitration hearing held on September 13, 2018, a discussion ensued between ACE/Arch's counsel and the arbitrator as to the proposed final award, with counsel advising the arbitrator that "these are undisputed numbers, we stipulate, the ancillary loss of [$1] million 429 [,000], an undisputed energy loss of [$]609[,000] . . ." When the arbitrator asked if there was any dispute about the figures, TransCanada's counsel said there was no dispute. (NYSCEF 792).

On September 21, 2018, the arbitrator issued an award as follows:

(1) The capacity loss damages equaled $42,022,631;

(2) The total time element loss equaled $44,062,147, consisting of the capacity loss, the ancillary revenue loss of $1,429,833, and the energy revenue loss of $609,683;

(3) The total time element loss is subject to a deductible of $34,155,000, resulting in a net loss of $9,907,147; and

(4) As ACE and Arch each provided coverage for 10 percent of the loss, they were each liable for $990,714.70 plus prejudgment interest accruing on April 21, 2010.

(NYSCEF 793).

By letter dated October 3, 2018, and addressed to ACE/Arch's counsel, TransCanada argued that based on the wrong amounts for TransCanada's business interruption losses

submitted by ACE/Arch, the arbitrator erroneously found as follows:

> As [ACE/Arch's expert] stated in his June 20, 2018 affidavit, TransCanada's energy revenue loss was $2,424,845 . . The Ancillary loss was $1,976,533 . . .
>
> In the proposed award that [TransCanada] submitted to the arbitrator, the energy loss is incorrectly stated to be $609,683 and the ancillary loss is incorrectly stated to be $1,429,833. The parties stipulated that those were the claim amounts, not the loss amounts.

Counsel thus asked that ACE/Arch correct the error in the award. (NYSCEF 795).

By letter dated October 5, 2018, ACE/Arch denied any error. (NYSCEF 796).

The parties then wrote to the arbitrator about the alleged error (NYSCEF 797, 799), and by email dated October 30, 2018, the arbitrator denied TransCanada's request to modify or correct the award (NYSCEF 800).

II. CONTENTIONS

ACE/Arch argue that the award should be confirmed absent a basis for vacating or modifying it pursuant to CPLR 7511(b)(1) or (c), which limit a court's ability to vacate an arbitrator's award to certain narrow grounds, none of which applies here. As TransCanada's opposition to the award is frivolous and appears to be an effort intended to delay resolution so that further interest accrues, they maintain that prejudgment interest should be stayed pending a decision on this motion. For the same reason, ACE/Arch seek an award of costs and fees associated with interposing this motion. (NYSCEF 782).

TransCanada asserts that CPLR 7511 and 7510 do not apply here absent the parties' agreement. Rather, the applicable standard of review, it claims, is that employed in reviewing the decision of a judicial hearing officer, thus warranting vacatur of the award as irrational and reflective of the wrong amounts for the revenue losses. Consequently, TransCanada's actual insurance claims or losses apply. (NYSCEF 836).

At oral argument, TransCanada argued that the arbitration was not binding, as the parties never agreed that there would be no standard of review of the award, and that the mistake of an arbitrator may be corrected by the court even if binding. (NYSCEF 838).

III. ANALYSIS

In *Matter of United Fed. of Teachers, Local 2, AFT, AFL-CIO v Bd. of Educ. of City School Dist. of City of N.Y.,* the Court held that in analyzing whether to confirm an award rendered after compulsory arbitration pursuant to CPLR 7510 or to vacate it pursuant to CPLR 7511, the standard of review is whether the award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power. (1 NY3d 72, 79 [2003]). While TransCanada relies on this case, there is no discussion in it as to whether parties must agree to permit an award to be analyzed pursuant to CPLR article 75, and TransCanada cites no other authority in support of its argument. TransCanada thus fails to establish that the award should not be evaluated pursuant to CPLR article 75.

Where arbitration is pursued by the parties' voluntary agreement, the arbitrator's factual and legal determinations are conclusive and not subject to judicial review in the absence of fraud, corruption, or other misconduct. (*Motor Veh. Acc. Indemn. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]). This differs from compulsory arbitration, which calls for a stricter standard of review due to the mandatory nature of the arbitration. Thus, a compulsory arbitration award must have evidentiary support and may not be arbitrary and capricious. (*Id.* at 223).

TransCanada argues, essentially, that the award is irrational because the arbitrator relied on the wrong amounts in calculating its damages. Errors of fact or law committed by the arbitrator, or his or her misconstruing evidence or arguments, are insufficient grounds for setting aside or disregarding a voluntary arbitration award. (23A Carmody-Wait 2d § 141:273 [2019];

Merrill Lynch, Pierce, Fenner & Smith, Inc. v Graef, 34 AD3d 220 [1st Dept 2006] ["well-settled" that arbitration award may not be vacated for arbitrator's errors of law or fact]).

Here, TransCanada neither alleges nor establishes that the award resulted from fraud, corruption, or other misconduct. Thus, even had the arbitrator erred in calculating the award and/or applied the amounts of TransCanada's losses, the award must be confirmed. (*See Henvill v Metro. Transp. Auth.*, 148 AD3d 460 [1st Dept 2017] [argument that award irrational and required vacatur rejected as court in considering award arising from voluntary arbitration may not review arbitrator's findings of fact]; *Adolphe v New York City Bd. of Educ.*, 89 AD3d 532 [1st Dept 2011], *lv denied* 19 NY3d 808 [2012] [mistakes of law or disregard of evidence do not constitute grounds for vacating award]).

In any event, TransCanada fails to show that the arbitrator's calculations were irrational or erroneous, given the parties' March 2018 stipulation, providing that the amounts set forth for ancillary and revenue losses were inclusive of "all" such "claimed" losses, and the undisputed representation made at the hearing that these were the correct amounts for those damages.

While TransCanada argues that ACE/Arch's expert presents different figures for its losses, the expert's report provides that the while TransCanada would have earned energy revenue of more than $2.4 million, that amount does not equal its claim to the insurance companies, as a certain amount of the loss was covered by another insurance policy. (NYSCEF 827). Thus, the amount TransCanada would have earned in energy revenue does not equal its claimed losses associated with that revenue. The same report also reflects that the higher figure cited by TransCanada for its ancillary loss is based on the expert's conclusion of what TransCanada would have earned in ancillary revenue, which is not necessarily the same as its claimed loss of that revenue.

Thus, even if the standard of review is whether the award is irrational, the arbitrator's findings are supported by the record. (*Matter of Hanover Ins. Co. v Vasquez*, 143 AD3d 612 [1st Dept 2016] [whether arbitration voluntary or compulsory irrelevant, as even under compulsory standard of review, award rationally supported by record]). The other errors allegedly made by the arbitrator in calculating the deductible are irrelevant for the same reasons, as they are based on alleged errors in calculating TransCanada's losses.

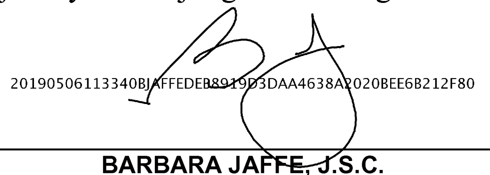
As TransCanada's efforts to correct or modify the award are based on plausible arguments, a stay of the accrual of prejudgment interest or an award of costs and attorney fees is not warranted. (*See e.g., Matter of Glantz v Nationwide Mut. Ins. Co*., 226 AD2d 638 [2d Dept 1996] [petitioner entitled to prejudgment interest from date of award until entry of judgment, even if petitioner delayed in entering judgment, as interest is not a penalty]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the motion to confirm the arbitrator's award is granted to the extent that the award is confirmed, and the motion is otherwise denied; and it is further

ORDERED, that the parties are directed to submit jointly a final judgment for signature.



5/6/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION	
	X	GRANTED		DENIED	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE