

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART 60

----- X

In the Matter of the Application of
TESS H. WACHS

Petitioner,

For an Order Pursuant to Article 75 Of the
Civil Practice Law and Rules to Confirm the
Supplemental Arbitration Award

INDEX NUMBER:
650783/19

-against-

RICHARD TIENKEN,

Respondent,

----- X

60 Centre Street
New York, New York
July 23, 2019

BEFORE:

HONORABLE MARCY S. FRIEDMAN, Justice

APPEARANCES:

GERARD FOX LAW PC
Attorney for the Plaintiff
1345 Sixth Avenue, 33rd Floor
New York, New York 10105
BY: MELISSA FRANCIS, ESQ.,

Appearances continued:

MONICA S. HORVATH - SENIOR COURT REPORTER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BRYAN MCKENNA, ESQ.,
Attorney for the Defendant
590 Madison Avenue, 18th Floor
New York, New York 10022

MONICA HORVATH
SENIOR COURT REPORTER
MONICA S. HORVATH - SENIOR COURT REPORTER

1 Proceedings

2 THE COURT: On the record.

3 Good morning.

4 May I have counsel's appearances, please?

5 MS. FRANCIS: Good morning, Your Honor.

6 Melissa Francis, from Gerard Fox Law, on behalf of
7 petitioner, Tess Wachs.

8 MR. MCKENNA: Bryan McKenna, for the defendant,
9 Richard Tienken.

10 THE COURT: Thank you.

11 I have a petition to confirm a supplemental
12 arbitration award.

13 I will hear, approximately, 10 minutes per side.

14 MS. FRANCIS: Thank you, Your Honor.

15 Your Honor, Arbitrator Altieri's supplemental award
16 as written, just like the prior arbitration award which was
17 confirmed as written by Justice Ramos back in October of
18 2017, should be confirmed under CPLR 7510, because aside
19 from the fact that the verified petition was filed within
20 the one year -- within one year of the supplemental award
21 delivery to the parties, respondent hasn't come close to
22 satisfying his heavy burden of showing any of the three
23 recognized grounds under well settled New York law for
24 disturbing an arbitration award.

25 That is, that the arbitration award was irrational,
MONICA S. HORVATH - SENIOR COURT REPORTER

1 Proceedings

2 or, violative of strong public policy, or, that the
3 arbitrator exceeded the scope of authority expressly
4 conferred upon him by the arbitration clause.

5 The only reason that respondent asserts here as to
6 why the Court should refuse to confirm the supplemental
7 award, which was made in Paragraph 6 of his affirmation,
8 without any authority to support and which is different from
9 the argument that respondent's counsel told the Court, he
10 would be making at the final hearing is that the arbitrator
11 supposedly made an erroneous statement of law in the
12 supplemental award.

13 But even if the arbitrator had made an erroneous
14 statement in the supplemental award and the arbitrator's
15 statement was not at all erroneous; as I can turn to in a
16 second, under well settled New York law, an erroneous
17 statement of fact or law by an arbitrator is not a proper or
18 valid ground for vacating or modifying an arbitration award.

19 As the Court of Appeals has held, even in
20 circumstances where an arbitrator makes errors of law or
21 fact, courts will not assume the role of overseers to
22 confirm the award to their sense of justice.

23 That was stated or held in New York State
24 Correctional Officer's and Police Benevolent Association
25 versus State of New York, 94 NY2d 321, pin cite 326 (1999).

MONICA S. HORVATH - SENIOR COURT REPORTER

1 Proceedings

2 Under New York law, a court may vacate an
3 arbitration award only if it violates strong public policy,
4 is irrational, or clearly exceeds, as specifically
5 enumerated, limitation on the arbitrator's power.

6 That was held in Cho v Hsien, H-S-I-E-N Twan
7 Investment Center Inc. v Bocas, 2008 New York slip opinion
8 31668U at * 4 Sup. Court New York County 2008 -- I'm
9 sorry -- Superior Court New York County (2011).

10 It was also held in one of Your Honor's cases.

11 The matter of --

12 THE COURT: Counsel, it is not necessary to cite
13 cases that are in the briefs on the record.

14 MS. FRANCIS: Okay.

15 Understood, Your Honor.

16 Outside of these narrowly -- these narrow
17 exceptions -- court's lack any authority to review arbitral
18 decisions even where an arbitrator has made an error of law
19 or fact.

20 Tellingly, counsel for respondent here does not,
21 because he cannot, specify any of these grounds for
22 potential basis for vacating, or, modifying the arbitrator's
23 supplemental award. And, for that reason, it is our
24 position that the respondent has failed to satisfy his heavy
25 burden under New York law of demonstrating that the

MONICA S. HORVATH - SENIOR COURT REPORTER

Proceedings

1
2 arbitrator's ruling violates any of the three recognized
3 grounds and the supplemental award must be confirmed
4 accordingly.

5 Although an erroneous statement of law, or a fact
6 by an arbitrator isn't one of the three grounds for
7 disturbing an arbitrator's award -- an arbitration award
8 under New York law -- the arbitrator's ruling here was not
9 erroneous. His ruling is clearly supported by the BCL, and,
10 a similar ruling was in fact previously confirmed as written
11 by Justice Ramos back in October of 2017.

12 Respondent argues that the arbitrator's ruling,
13 that:

14 "If the shareholders are unable to agree on the
15 election of directors and officers, such division and
16 descension will result in deadlock and respondent and
17 petitioner may proceed with their statutory rights
18 under such circumstances based on this finding."

19 He argues that that ruling is erroneous simply
20 because the relevant BCL provision, which is BCL
21 Section 1104, does not expressly identify an inability to
22 elect new officers as grounds for deadlock.

23 But the inability of petitioner and respondent, as
24 the company's 50 percent shareholders and only two directors
25 to agree on election of the company's officers would

MONICA S. HORVATH - SENIOR COURT REPORTER

Proceedings

1
2 constitute sufficient grounds under both BCL Section
3 1104 (a) (1) and BCL Section 1104 (a) (3) for either
4 petitioner or respondent to petition for dissolution of the
5 company.

6 Indeed, the arbitrator's prior award which
7 contained a very similar statement regarding deadlock, was
8 already confirmed and entered by the court as written as I
9 mentioned earlier in October of 2017.

10 In the prior ruling in the initial award, which had
11 provided that the director's inability to agree on the
12 election of officers, would constitute sufficient evidence
13 of internal descension that would render dissolution
14 beneficial to the shareholders, under BCL 1104 (a) (3) in
15 which was already confirmed as written and entered, by the
16 Court.

17 That ruling and the initial award is very similar
18 to the ruling that respondent's counsel takes issue with
19 here with respect to the supplemental arbitration award; the
20 statement which I just read on the record a short while ago.

21 Given that the verified petition was filed within
22 one year and respondent has failed to satisfy his heavy
23 burden, it is petitioner's position that petitioner is
24 entitled to an order confirming the supplemental award as
25 is.

MONICA S. HORVATH - SENIOR COURT REPORTER

1 Proceedings

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. MCKENNA: I don't think that I will take all 10,
5 Your Honor.

6 The original, as noted in my papers, the complaint
7 and arbitration doesn't seek dissolution, doesn't seek
8 permission to move for dissolution. It seeks damages, fraud
9 concealment, corporate waste, mismanagement.

10 And, then, Justice Ramos, at one of the hearings,
11 mentioned that the petitioner was never going to be an
12 officer because of the fact that the two directors -- they
13 were officers in place in this company; the company has been
14 acting and moving forward and doing business and paying off
15 the debt that the petitioner's late husband incurred with
16 Mr. Tienken. And, it's just a matter of her wanting a
17 direct role in the company.

18 It's not about officers. It's not about directors;
19 which she is one -- she voted herself in -- it's about
20 Miss Wachs, wanting a direct hand in operating the company
21 even on a day-to-day basis, which she doesn't have. And,
22 then, there's no right of a shareholder to have that.

23 But, she is a director of the company, and, she
24 does have the rights of a director. She has been to
25 meetings.

MONICA S. HORVATH - SENIOR COURT REPORTER

1 Proceedings

2 And while the shareholders are divided in this,
3 again, if the shareholders are unable to agree on the
4 election of the directors -- the quote from the arbitration
5 award was:

6 "If the shareholders are unable to agree on
7 the election of directors and officers such division
8 essentially will result in deadlock."

9 I could be parsing words here, but there's no
10 dissension of the election of directors. Only on the
11 direction of officers.

12 And, at a minimum, I think we need to go back to
13 the arbitrator and say is it either or, is it directors and
14 officers, and, ask for some clarity on the supplemental
15 award. Rather than basically rubber stamp the arbitrator's
16 ruling followed by Miss Wachs moving for dissolution and
17 leaving my client as the only personal guarantor on a
18 tremendous amount of debt that this company has and it has
19 been paying off.

20 That's really it, Your Honor.

21 THE COURT: Do you want to reply?

22 MS. FRANCIS: No, Your Honor.

23 THE COURT: Okay.

24 We will take a five minute recess.

25 Thank you.

MONICA S. HORVATH - SENIOR COURT REPORTER

1 Proceedings

2 (Whereupon, there was a brief recess.)

3 (Whereupon, the proceeding resumes.)

4 THE COURT: Back on the record.

5 I will now give you a decision on the record.

6 I have before me the petition of petitioner

7 Tess Wachs to confirm a supplemental arbitration award dated

8 February 13, 2018, and, rendered by Peter Altieri,

9 A-L-T-I-E-R-I, arbitrator.

10 It is well settled that under CPLR 7511, an

11 arbitration award must be vacated where an arbitrator

12 "exceeded his power or so imperfectly executed it that a

13 final and definite award upon the subject matter submitted

14 was not made." It is further settled that an arbitrator

15 exceeds his power within the meaning of 7511 (b) where the

16 arbitrator's "award violates a strong public policy, is

17 irrational or clearly exceeds a specifically enumerated

18 limitation on the arbitrator's power." Matter of Kowaleski,

19 K-O-W-A-L-E-S-K-I, 16 NY3d 85, 90, (2010).

20 Here, respondent argues that the arbitrator's award

21 was erroneous because the award provided that dissolution

22 proceedings could be taken in the event the parties were

23 unable at a meeting to elect officers. According to

24 respondent Business Corporation Law 1104, permits

25 dissolution only where shareholders are unable to agree on

MONICA S. HORVATH - SENIOR COURT REPORTER

Proceedings

1
2 the election of directors as opposed to officers. That
3 contention is unsupported by any citation to legal
4 authority, but, in any event, even if the arbitrator's
5 interpretation of the section were incorrect that would not
6 rise to the level of irrationality within the meaning of
7 CPLR 7511. To the extent that respondent also argues that
8 the arbitrator exceeded his authority by authorizing
9 dissolution proceedings under specified circumstances that
10 contention is unavailing. The final award of the same
11 arbitrator dated February 14, 2017, also provided in
12 subdivision (e) of the award for dissolution proceedings
13 under specified circumstances. That award was confirmed by
14 order of Justice Ramos of this court in the proceeding to
15 confirm the award brought under Index Number 652586 of 2017.
16 That order confirming the award is law of the case.

17 It is hereby ordered that the supplemental award
18 dated February 13, 2018, is confirmed.

19 This constitutes the decision and order of this
20 Court. Movant/petitioner shall promptly obtain a copy of the
21 transcript of today's proceedings, E-file it and file a
22 hardcopy with the clerk of Part 60.

23 The decision will not be so ordered until the
24 hardcopy is filed. The parties are advised that I reserve
25 the right to correct errors in the transcript of the

MONICA S. HORVATH - SENIOR COURT REPORTER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Proceedings

decision, therefore, if it is needed for any further purpose, they should be sure they have a copy of the transcript as so ordered and not merely as signed by the court reporter.

This concludes the Court's decision and order. The record is closed for today's proceedings.

Thank you.

MR. MCKENNA: Thank you, Your Honor.

MS. FRANCIS: Thank you, Your Honor.

* * *

THE ABOVE IS CERTIFIED TO BE
A TRUE AND ACCURATE TRANSCRIPT
OF THE PROCEEDING RECORDED BY ME

Monica Horvath
MONICA HORVATH
SENIOR COURT REPORTER

MONICA S. HORVATH - SENIOR COURT REPORTER