

Short Form Order & Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ROBERT J. McDONALD IA Part 34
Justice

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SENECA INSURANCE COMPANY		Number <u>499</u> 2004
- against -		Motion
		Date <u>November 12,</u> 2009
RUDAY REALTY CORP., et al.		Motion
	x	Cal. Number <u>30</u>
		Motion Seq. No. <u>10</u>

The following papers numbered 1 to 16 read on this motion by plaintiff Seneca Insurance Company (Seneca) to confirm a mediation award; and on this cross motion by defendants Ruday Realty Corp. (Ruday) and Crosstown Management Corp. (Crosstown) to vacate and/or upwardly modify same.

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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

The instant action stems from an incident which occurred on May 5, 2003, wherein Alex Pstrusinski (Pstrusinski) allegedly sustained injuries while performing renovation work at the premises owned by Ruday, managed by Crosstown, and leased to nonparty Antonio's Lighting Company. As a result, Pstrusinski brought suit against these three parties. Seneca

then brought the instant action seeking, inter alia, a judgment declaring that it had no obligation to defend and indemnify its alleged insureds – Ruday and Crosstown – in Pstrusinski’s personal injury action. Thereafter, Ruday and Crosstown brought a third-party action against their tenant and brokers who placed the subject insurance policy. After a jury returned a verdict awarding money damages to Pstrusinski in his personal injury action, the claim was settled by Seneca and defendant Travelers Indemnity Corp., with each insurer contributing \$750,000 and \$500,000, respectively.

Seneca, Ruday, and Crosstown entered into a stipulation of settlement before this court on May 4, 2009, which, among other things, settled the above-captioned action. The sole remaining issue to be determined was the counterclaim asserted by Ruday and Crosstown (collectively defendants) against Seneca to recover legal fees and expenses, which was to be submitted to binding mediation. Pursuant to the stipulation: (1) counsel for defendants was to select four potential mediators of which Seneca would select one; (2) the claim for all legal fees sought by defendants ended as of May 1, 2009; (3) the mediator’s award would be subject to a 30% ultimate reduction to be kept in confidence between counsel for the parties; (4) payment of the net award was to be made within 15 days of the rendering of said award; and (5) in the event Seneca did not make payment within 15 days, defendants would be entitled to enter judgment for the net award. The binding mediation was held on July 16, 2009. The mediator rendered his decision on July 27, 2009, finding Seneca to be indebted to defendants in the total amount of \$550,000 (reduced ultimately to \$385,000).

After a review of the cross motion made by defendants, it remains unclear the grounds for vacatur upon which these defendants rely to support their request for relief under CPLR 7511. Defendants principally assert that the mediator’s award should be vacated or upwardly modified “as being totally arbitrary and capricious and so outrageous as to indicate bias.” In addition, however, defendants make reference, directly or otherwise, to the following subsections of CPLR 7511: (b) (i), (ii), (iii) and (c) (1). As such, each will be discussed in turn.

As a preliminary matter, contrary to defendants’ contentions, it is not this court’s role to decide whether the mediator’s award was “arbitrary and capricious.” Such a standard is only utilized in the context of compulsory arbitrations and requires closer judicial scrutiny under CPLR 7511 (b) (*see Matter of American Exp. Property Cas. Co. v Vinci*, 63 AD3d 1055 [2009]; *Matter of Saunders v Rockland Bd. of Coop. Educ. Servs.*, 62 AD3d 1012 [2009]; *Matter of Progressive Cas. Ins. Co. v New York State Ins. Fund*, 47 AD3d 633 [2008]). That having been said, judicial review of the award in this case is extremely limited since the parties voluntarily stipulated to have the issue of legal fees and expenses determined by a mediator of their choice (*see Matter of Teamsters Local 814*

Welfare, Pension & Annuity Funds v County Van Lines, Inc., 56 AD3d 567 [2008]; *Matter of Dingee v County of Dutchess*, 300 AD2d 305 [2002]). Additionally, courts must give deference to the decision reached, upholding same insofar as the mediator “offer[s] even a barely colorable justification for the outcome reached” (*Matter of Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.)*, 579 F2d 691, 704 [2d Cir 1978]; see *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006]).

Pursuant to CPLR 7511 (b) (1) (i) and (ii), respectively, the mediation award may be vacated if defendants’ rights were prejudiced by “corruption, fraud or misconduct in procuring the award” or “partiality of an arbitrator appointed as a neutral.” In support of their claims pursuant to the above sections of the CPLR, defendants assert that Seneca and its counsel brought an attorney named Al Lewis (Lewis) to the mediation for the sole purpose of acting as a “hired gun due to [Lewis’] longstanding personal and professional relationship with the mediator over a 35 to 40 year period.” Defendants contend that Lewis had never been a part of the extensive litigation surrounding the instant matter which occurred over a period of six years and involved three separate lawsuits, and that defendants had never been aware of Lewis’ existence until the mediation. Furthermore, defendants state that the mediator spent time “behind closed doors” with Lewis discussing “the good old days.” Defendants claim that the mediator’s misconduct and bias due to Lewis’ improper influence is apparent given the following examples: the mediator (1) “inexplicably” refused to award defendants fees and expenses for all three suits; (2) awarded essentially 50% of what defendants initially sought, without mention of what calculations were made to arrive at the final award amount; (3) dedicated a portion of his decision to the issue of a conflict of interest when the only issue to be decided – as per the parties’ stipulation – was that of the amount of legal fees and expenses to be awarded; and (4) allegedly misapplied the controlling law and disregarded the facts.

Defendants have failed to establish by clear and convincing evidence that Seneca procured its award by means of fraud or misconduct (see *Matter of Balis v Chubb Group of Ins. Cos.*, 50 AD3d 682 [2008]; *Matter of Mounier v American Tr. Ins. Co.*, 36 AD3d 617 [2007]; *Matter of Hausknecht v Comprehensive Med. Care of N.Y., P.C.*, 24 AD3d 778 [2005]). First, the fact that Lewis and the mediator may have crossed paths some 26 years before the subject mediation, not having seen each other since, hardly demonstrates bias or partiality on the part of the mediator (see *Matter of IBK Enters., Inc. v Onekey, LLC*, 64 AD3d 596 [2009]; see also *Matter of Henry Quentzel Plumbing Supply Co. v Quentzel*, 193 AD2d 678 [1993] [the fact that the arbitrator and witness had personal contact two to four years prior to the hearing was insufficient to support a finding that there was an appearance of bias or partiality, and “if the courts were to disqualify every arbitrator who has had professional contacts with a party or witness, it would be difficult to maintain the . . . system”]). Second, the mediator’s bases for rendering his award – with which defendants

take issue – will not be second-guessed by this court, as “the path of analysis, proof and persuasion by which an arbitrator reaches a conclusion is beyond judicial scrutiny” (*Balis*, 50 AD3d at 683). Third, defendants’ opinion that the mediator misapplied substantive law – even assuming this court were to agree with defendants’ assessment – is not a proper basis for vacating an award (*see IBK Enters., Inc.*, 64 AD3d at 597-598). Fourth, while the issue to be decided was that of the amount of fees and expenses to be awarded as per the parties’ stipulation, the discussion of a conflict of interest which existed at a certain point in the litigation spoke directly to the issue of legal fees, and was, therefore, a permissible discussion by the mediator. Even if the issue of a conflict of interest had nothing to do with the amount of legal fees to be awarded, its discussion was not specifically prohibited by the parties’ stipulation (*see Matter of Wieder v Schwartz*, 35 AD3d 752 [2006]), such that the mention of same by the mediator would have risen to the level of misconduct.

As to the mediator’s private discussions with Lewis, while private communications between an arbitrator and a party-litigant can constitute misconduct or partiality, the discussion here admittedly concerned a personal matter that was “wholly unrelated to the subject matter” that was presented (*see Hausknecht*, 24 AD3d at 780). In any event, by proceeding with the mediation without challenging same (or without challenging the apparent “relationship” between the mediator and Lewis, for that matter), defendants effectively waived any objections they had to the mediator’s purported bias or partiality (*see Mounier*, 36 AD3d at 617; *Matter of Reilly v Progressive Ins. Co.*, 5 AD3d 776 [2004]; *Matter of Rothman v RE/MAX of N.Y.*, 274 AD3d 520 [2000]).

It should also be noted that the parties engaged in a mediation as opposed to an arbitration. Mediation is much less structured than an arbitration, and “[e]ach side can speak freely to the mediator out of the hearing of the other party, a meeting generally referred to as a ‘caucus’ ” (4 NY Prac, Com. Litig. in New York State Courts § 46:5). In fact, during the mediation, both parties agreed and had an opportunity to speak “behind closed doors” with the mediator to assess legal fees (*see Matter of Jelenevsky v Leonakis*, 234 AD2d 548 [1996] [ex parte discussions must be authorized by the parties]).

Turning now to CPLR 7511 (b) (1) (iii), it is well-settled law that an arbitration award may not be vacated unless, pursuant to this section, it is violative of a strong public policy, it is totally irrational, or it exceeds an enumerated limitation on the arbitrator’s power (*Matter of New York City Tr. Auth. v Transport Workers’ Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]; *Matter of Jadhav v Ackerman*, 62 AD3d 797 [2009]; *Matter of Erin Constr. & Dev. Co., Inc. v Meltzer*, 58 AD3d 729 [2009]). An award is deemed irrational if there is “no proof whatsoever to justify the award” (*Matter of Peckerman v D & D Assoc.*, 165 AD2d 289 [1991]; *see Jadhav*, 62 AD3d at 798; *Erin Constr. & Dev. Co., Inc.*, 58 AD3d at 730). Defendants focus remains on the latter two grounds.

Defendants have failed to demonstrate that the award should be vacated pursuant to either ground under CPLR 7511 (b) (1) (iii). First, defendants argue that the mediator's decision was "in direct contravention of the law in this jurisdiction," referring to the Court of Appeals case of *Mighty Midgets v Centennial Ins. Co.* (47 NY2d 12 [1979]). The Court in *Mighty Midgets* held that attorneys fees may only be recovered from an insurer when the insured "has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations" (*id.* at 21). This court finds that the mediator was wholly within his power to award legal fees with respect to the declaratory judgment action and the third-party action, and not for the underlying action. This is so especially considering the fact that Seneca provided a defense in the underlying action. As the mediator explained in his reasoned decision, the underlying action certainly did not place defendants in a "defensive posture" by any legal steps that Seneca took; rather, it was the *plaintiff in the underlying action* who cast defendants in such a role. Defendants are incorrect in their assertion that the mediator neglected to award fees for the declaratory action, as: (1) it is clear that the declaratory action is the action which precipitated the mediation in the first instance; and (2) the final award included fees from both the declaratory and third-party action (as evidenced by the fact that defendants did not seek as much as \$550,000 in fees for the third-party action). Thus, the award was consistent with the evidence presented, the stipulation between the parties, and the applicable law (*see Jadhav*, 62 AD3d at 798; *Matter of Transport Workers Union, Local 100 v New York City Tr. Auth.*, 57 AD3d 684 [2008]; *Matter of City of Peekskill v Local 456, Intl. Bhd. of Teamsters*, 49 AD3d 730 [2008]). In any event, as discussed above, any purported misapplication of substantive rules of law will not result in a vacatur of the mediator's award (*see Matter of IBK Enters., Inc.*, 64 AD3d at 597-598; *Erin Constr. & Dev. Co., Inc.*, 58 AD3d at 730; *Matter of NFB Inv. Servs. Corp. v Fitzgerald*, 49 AD3d 747 [2008]).

Second, the fact that the mediator did not strictly adhere to the retainer agreement between defendants' counsel and his clients does not render the award irrational or in excess of the mediator's power. It was within the mediator's power to consider the reasonableness of fees and expenses sought by defendants. To that end, there was no specific limitation placed upon the mediator pursuant to the parties' stipulation that would have required him to, without any assessment as to reasonableness, simply award defendants whatever amount they had sought (otherwise there would have been no need for the mediation at all). Moreover, it is well-settled 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 [1999]; *Matter of DeRaffele Mfg. Co., Inc. v Kaloakas Mgt. Corp.*, 48 AD3d 807 [2008]; *Matter of TC Contr., Inc.*, v 72-02 N.

Blvd. Realty Corp., 39 AD3d 762 [2007]). Finally, to the extent that defendants claim that the award should be vacated due to the mediator's failure to outline or provide any calculations he used in arriving at the amount of the award in his decision, as discussed above, the mediator need not have done so (*see Hausknecht*, 24 AD3d at 779).

Neither does the record support defendants' claim that there was a "miscalculation of figures" in the mediator's award as per CPLR 7511 (c) (1) (*see Matter of Scher Law Firm, LLP v 87-10 51st Ave. Owners Corp.*, 52 AD3d 611 [2008]; *Matter of Cupero v Herman*, 50 AD3d 791 [2008]). What defendants characterize as an arbitrary calculation is, in fact, a substantive challenge which has been already determined by the mediator; as such, this claim is not a proper ground for modification pursuant to the statute (*see Matter of Israel Aircraft Indus. (DDY-Wing Aviation)*, 284 AD2d 281 [2001]; 5 NY Jur 2d, Arbitration and Award § 233). Furthermore, as the point was belabored above, the award may not be vacated because the mediator did not include figures and calculations in his decision (*see Hausknecht*, 24 AD3d at 779; *Matter of Bay Ridge Med. Group v Health Ins. Plan of Greater N.Y.*, 22 AD2d 807 [1964]), or because defendants disagree with the actual "figures the [mediator] chose to use in the exercise of his . . . discretion" (5 NY Jur 2d, Arbitration and Award § 234).

To the extent that defendants assert that the 30% reduction of their award should be ignored since Seneca failed to issue payment within 15 days as per the stipulation, this argument has no merit. The stipulation states the following: "in the event that Seneca does not make payment within 15 days that . . . Crosstown Management and Ruday Realty may enter judgment for the net [mediator's] award." Nowhere does it entitle defendants to upwardly modify the mediator's award to the full amount sought. Furthermore, to the extent defendants seek legal fees that extend beyond the stipulation date (May 1, 2009), there is no basis for demanding same. Finally, the court has reviewed the parties' remaining contentions, and find them to be without merit.

Accordingly, Seneca's motion to confirm the mediation award is granted. The cross motion by Ruday Realty and Crosstown Management is denied. The mediation award of July 27, 2009 is hereby confirmed and the clerk is directed to enter judgment in favor of Ruday Realty and Crosstown Management in the amount of \$385,000. This constitutes the order and judgment of this court.

Dated: January 26, 2010

J.S.C.