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Matter of Papakonstadinou v Sparakis
2021 NY Slip Op 50543(U)
Decided on June 11, 2021
Supreme Court, Albany County
Platkin, J.
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Decided on June 11, 2021

Supreme Court, Albany County

In the Matter of the Application to Confirm an Arbitration Award of Theodore Papakonstadinou and AKTOR CORPORATION, Petitioners,

against

Nikolaos Sparakis, LIZBETH GOZZER and GOZZER CORPORATION, Respondents.

907853-20

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Richard M. Platkin, J.

Petitioners Theodore Papakonstadinou and Aktor Corporation bring this special proceeding pursuant to CPLR article 75, seeking an order under CPLR 7502 and 7510 confirming an arbitration award dated December 1, 2020, as amended on December 8, 2020, and entry of judgment thereupon under CPLR 7514 (a). Respondents Nikolaos Sparakis and Lizbeth Gozzer oppose the verified petition (*see* NYSCEF Doc No. 1 ["Petition"]) and cross-petition under CPLR 7511 to vacate or modify the award (*see* NYSCEF Doc No. 10 ["Cross Petition"]).

BACKGROUND[FN1]

Petitioner Theodore Papakonstadinou is a director and owner of 95% of the voting shares of respondent Gozzer Corporation ("Gozzer Corp." or "Corporation"), a domestic corporation with its principal place of business at 1043 Broadway, Albany, New York. The remaining 5% of the shares are owned by respondent Lizbeth Gozzer ("Gozzer").

In 2009, respondent Nikolaos Sparakis sought assistance concerning Gozzer Corp. from Papakonstadinou, his then-friend. Sparakis had formed the Corporation to operate a construction business, but the Corporation's stock had been put in the name of Gozzer, with whom Sparakis was in a personal relationship, for various reasons. However, Gozzer lacked experience in the construction industry, which left the Corporation unable to obtain bid bonds.

In January 2012, Papakonstadinou agreed to assist Sparakis by providing capital to Gozzer Corp. and by assisting in preparing bids and obtaining bonds. In exchange, Gozzer transferred 95% of the Corporation's shares to Papakonstadinou. The parties apparently agreed that Papakonstadinou's investment would be repaid, and profits from the venture would be shared in some manner (*see* Cross Petition, ¶ 4; NYSCEF Doc No. 46, ¶ 4). A

dispute thereafter arose between Papakonstadinou and Sparakis regarding their agreement (*see* Cross Petition, ¶ 5; NYSCEF Doc No. 46, ¶ 1).

In 2015, Sparakis and Gozzer commenced an action in Queens County against Papakonstadinou, Gozzer Corp. and Aktor Corporation ("Aktor"), a construction company owned by Papakonstadinou (*see Sparakis v Gozzer Corp.*, Queens County Index No. 712508-15 ["Queens Action"]). Sparakis and Gozzer alleged, among other things: (i) failure to repay Sparakis for loans made to the Corporation; (ii) failure to pay Sparakis an annual salary; (iii) [*2]breach of the duty to properly operate and manage Gozzer Corp.; (iv) fraud, predicated on allegations that Papakonstadinou misrepresented that the assets of Gozzer Corp. would be split and its shares would be transferred to Sparakis and/or Gozzer; and (v) breaches of fiduciary duties owed to the Corporation, including diversion of corporate funds and assets. In an answer with counterclaims, Papakonstadinou and Gozzer Corp. alleged similar wrongdoing by Sparakis and Gozzer.

As a result of discovery violations, Supreme Court, Queens County (Grays, J.) issued an order on January 17, 2018 striking the answer of Aktor and ordering an inquest on damages (*see* NYSCEF Doc No. 13). The trial of the Queens Action was scheduled to begin on April 1, 2019.

In November 2018, Papakonstadinou brought a special proceeding in this Court under Business Corporation Law article 11, seeking the dissolution of Gozzer Corp., appointment of a temporary receiver and an order restraining Sparakis and Gozzer from transacting the business of Gozzer Corp. (*see* Albany County Index No. 907137-18 ["Dissolution Proceeding"]). In a Decision & Order dated January 31, 2019, the Court denied Sparakis and Gozzer's motion to dismiss the dissolution petition and issued the requested preliminary injunction (*see Matter of Papakonstadinou [Gozzer Corp.]*, 62 Misc 3d 1217[A], 2019 NY Slip Op 50164[U] [Sup Ct, Albany County 2019]).

On the scheduled trial date of the Queens Action, the parties agreed to arbitrate their claims and counterclaims, and they executed a Stipulation for Binding Arbitration to that effect, which was so-ordered by the Court (*see* NYSCEF Doc No. 15 ["Arbitration Stipulation"]). As part of the stipulation, Papakonstadinou agreed to request a stay of the Dissolution Proceeding, which this Court granted.

The parties then proceeded to arbitrate under the Arbitration Stipulation, which provided that: (1) the arbitration shall be conducted in New York City; (2) the arbitration "shall be subject to the Strike Order," unless reversed by the Appellate Division during the pendency of the arbitration; and (3) the parties agree to "request of the arbitrator a full opinion explaining the reasoning for any award" (*id*., ¶¶ 1, 4, 11).

The parties jointly selected Hon. Francis G. Conrad, a retired bankruptcy judge and accountant, to serve as the arbitrator ("Arbitrator"). The arbitration commenced on September 9, 2019 and concluded on or about April 1, 2020, following ten days of hearings and the submission of post-hearing memoranda (*see* Petition, ¶ 2; Cross Petition, ¶¶ 11-12).

The Arbitrator "promised the parties that he would render a decision by May 1, [2020]" (Petition, ¶ 3). By late October 2020, however, the Arbitrator still had not rendered a decision (*see id*.). "Accordingly, the parties wrote a joint letter to the Arbitrator dated October 28, 2020, which advised that if a decision was not emailed by 5:00 PM on November 15 [2020], the parties would consider the Arbitration terminated and would seek a new arbitrator to re-arbitrate the case" (*id*.). The Arbitrator responded that this deadline would require his decision to "be truncated" (*id*., ¶ 4), despite the parties' stipulation calling for a reasoned decision.

On November 6, 2020, counsel for petitioners wrote to advise that if the Arbitrator felt that more time was needed to issue a reasoned decision, his clients were willing to extend the deadline to December 6, 2020 (*see id*.). Respondents did not join in or otherwise respond to petitioners' unilateral submission.

The Arbitrator did not issue a decision by the November 15, 2020 deadline. On the following day, November 16, 2020, counsel for respondents notified the Arbitrator that respondents considered the arbitration to have been terminated in accordance with the deadline [*3]established by the joint letter of October 28, 2020 and requested the Arbitrator to cease work on an award (*see id*.; NYSCEF Doc No. 22).

Later that day, the Arbitrator informed the parties he had completed his decision, but it still required editing (*see* NYSCEF Doc No. 23). Respondents' counsel replied on November 17, 2020 that his clients' position, "as set forth in the joint letter of October 28, 2020 and [counsel's] letter of November 16, 2020[,] remain[ed] the same" (*id*.).

On December 1, 2020, the Arbitrator issued his decision, which he transmitted to counsel via email on December 2, 2020 (*see* Cross Petition, ¶ 16; NYSCEF Doc No. 2 ["Decision"]). The Decision awarded Sparakis $155,390 and directed Papakonstadinou to transfer his shares in Gozzer Corp. to Sparakis. On December 8, 2020, in response to emails from counsel regarding errors in the Decision (*see* Petition, ¶¶ 6-7; Cross Petition, ¶ 17; NYSCEF Doc No. 27),[FN2] the Arbitrator reduced the sum awarded to Sparakis to $77,695 (*see* NYSCEF Doc No. 3).

Petitioners commenced this special proceeding on December 16, 2020, seeking an order and judgment under CPLR 7502 and 7510 confirming the arbitration award as stated in the modified Decision. Respondents oppose the Petition and cross-petition for an order vacating and/or modifying the award.

As a threshold matter, respondents argue this proceeding should have been commenced in Queens County. Respondents next contend that the Arbitrator's Decision is a legal nullity based on his failure to render an award by the deadline jointly established by the parties. Respondents further argue that the Decision was issued in manifest disregard of the Strike Order and the Arbitration Stipulation. Finally, respondents argue that the Decision was irrational in various respects and should be vacated or modified pursuant to CPLR 7511 (c) (1).

ANALYSIS

A. Venue

Respondents contend this proceeding was brought in an improper county. They refer to a document entitled "Arbitration Hearing Order," which provides that "[t]he arbitration ruling shall be submitted for entry of judgment with the Supreme Court of New York, Queens County, Commercial Division" (NYSCEF Doc No. 16, ¶ 20 ["Order"]).

However, the Order was not signed by the Arbitrator or the parties. Indeed, the record establishes that this instrument was never finalized and, as such, does not represent a binding stipulation or valid order (*see id.*; NYSCEF Doc Nos. 38-39; *see also* NYSCEF Doc No. 47, ¶ 4 [respondents concede that "the Arbitrator never forwarded a finalized version"]).

The operative document, the so-ordered Arbitration Stipulation, does not require this proceeding to be brought in any particular county. With respect to geography, it merely requires that: (1) the arbitration be conducted in New York City; and (2) if the parties cannot agree on an arbitrator, they may commence a proceeding in Queens County under CPLR 7504 to have an arbitrator appointed (*see* Arbitration Stipulation, ¶¶ 1-2).

Where, as here, a particular county is not specified in the arbitration agreement, a proceeding to confirm the arbitration award may be brought "in the county where at least one of the parties resides or is doing business" (CPLR 7502 [a] [i]; *see Matter of Phoenix Ins. Co. v [*4]Casteneda*, 287 AD2d 507, 508 [2d Dept 2001]). Inasmuch as both corporate parties have principal offices in Albany County (*see* CPLR 503 [c]; NYSCEF Doc Nos. 36-37; Cross Petition, ¶ 3; NYSCEF Doc No. 46, ¶ 1), this proceeding is properly venued.

B. Timing of the Award/Termination of the Arbitration

Respondents argue that the Arbitrator's Decision "is void and should be declared a legal nullity because the parties mutually agreed to terminate the arbitration before the Decision was issued" (NYSCEF Doc No. 12 ["Cooke Aff."], p. 6; *see* Cross Petition, ¶ 18).

Petitioners disagree, arguing that: (1) the Arbitration Stipulation sets no time limit; (2) the Arbitrator properly could have concluded that the November 15, 2020 deadline was extended via the November 6, 2020 letter from petitioners' counsel; and (3) respondents have identified no prejudice from the 17-day delay between the November 15, 2020 deadline and the transmittal of the Decision on December 2, 2020.

1. The Pertinent Facts

The Arbitrator told the parties he would render a decision by May 1, 2020 (*see* Petition, ¶ 3). In response to an April 30, 2020 inquiry from counsel, the Arbitrator indicated his decision would be issued within a week or two (*see* NYSCEF Doc No. 17).

By late October 2020, however, the parties still "had not received a decision" (Petition, ¶ 3). The parties wrote a joint letter to the Arbitrator on October 28, 2020, signed by attorneys for petitioners and respondents ("Joint Letter"). The Joint Letter stated:

> This letter is being written jointly on behalf of counsel for all parties in the above referenced arbitration. As you know, the arbitration was concluded on April 3, 2020 when the parties sent supplemental emails clarifying certain positions articulated during the oral closings which took place telephonically on March 31, 2020.

It was agreed following the close of arbitration that a decision would be issued by May 11, 2020. Since the passing of that date, you have made several representations as to when the decision would be issued, the most recent being September 30, 2020. Unfortunately, we are now nearly seven (7) months from the end of the arbitration and no decision has been issued. In addition, our recent efforts to contact you by email and phone have been unsuccessful. As a result, it is unclear at this point whether you intend to issue a decision. *Accordingly, we respectfully request that if a decision is not emailed to counsel for both parties by 5 pm on November 15, 2020, you cease work on the case. The parties will then proceed to seek a new arbitrator and unfortunately, re-arbitrate the case*. We regret that the situation has come to this point given the extensive and costly proceedings to date, but the lack of a decision coupled with the failure to respond to our recent inquiries leaves us with no other option (NYSCEF Doc No. 18 [emphasis added]).

The Arbitrator telephoned respondents' counsel on November 4, 2020 to say he had received the Joint Letter and was upset by its contents (*see* Cooke Aff., ¶ 22).[FN3] The Arbitrator [*5]also stated his belief that the deadline was November 5, 2020, but respondents' counsel reviewed the Joint Letter with him and confirmed the November 15, 2020 deadline (*see id*.). The Arbitrator indicated that he would render a decision by the deadline, but that it would be abbreviated due to the time restriction imposed by the parties (*see id*.; *see also* Petition, ¶ 4).[FN4]

Respondents' counsel relayed the substance of that conversation to petitioners' counsel as follows:

> [The Arbitrator] just called me. He said he tried to reach out to you also but was having trouble getting hold of you. He seemed miffed initially by the letter and blamed the delay largely on the absence of a transcript for such a lengthy arbitration. He then settled down and said he would have the decision out in the near future and appreciated why our clients were frustrated. He initially thought the deadline was 11/5 but I pointed out to him that the d/l was 11/15. He checked the letter again and confirmed that it was in fact 11/15. He said that the decision would be more abbreviated than originally planned because of the time constraint we

imposed. Not sure what to believe anymore but he sounded healthy. We will see (NYSCEF Doc No. 20 [emphasis added]).

Petitioners' counsel suggested that the parties write a joint letter extending the deadline by another three weeks, but respondents were unwilling to agree (*see* Cooke Aff., ¶ 23). Petitioners' counsel then unilaterally sent a letter to the Arbitrator on November 6, 2020 indicating his clients' willingness to extend the deadline to December 6, 2020 if the Arbitrator felt he needed "more time" to issue a comprehensive decision (NYSCEF Doc No. 21). The Arbitrator did not respond to petitioners' letter and did not request an extension of the November 15, 2020 deadline (*see* Cooke Aff., ¶ 23).

When the November 15, 2020 deadline passed without issuance of an award, respondents' counsel wrote to the Arbitrator on November 16, 2020 to: (1) advise that his clients considered the arbitration to have been terminated in accordance with the Joint Letter; and (2) request the Arbitrator to "cease any work on issuing a decision" (NYSCEF Doc No. 22).

The Arbitrator responded by advising the parties he had finished his decision and was "sending it out for editing" (NYSCEF Doc No. 23). The Arbitrator also asked, "[i]f this is a final letter let me know" (*id*.).

Respondents' counsel replied on November 17, 2020 that his clients' position was "as set forth in the joint letter of October 28, 2020 and my letter of November 16, 2020 [and] remains the same" (*id*.).

The Arbitrator nonetheless responded that he had sent the Decision for editing and that it might take "a day or two" because he "ha[s] to get in line" (NYSCEF Doc No. 24). The Arbitrator then issued the Decision on December 1, 2020.[FN5]

*[*6]2. Analysis*

CPLR 7507 requires the arbitrator's award to be issued "within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he [or she] notifies the arbitrator in writing of his [or her] objection prior to the delivery of the award to him [or her]."

Inasmuch as "[a]rbitration is a matter of contract, grounded in agreement of the parties" (*Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 630 [2013] [internal quotation marks and citations omitted]), it always is "open to the parties in any instrument . . . to provide explicitly for modification or termination of their agreement to arbitrate" (*Matter of Schlaifer v Sedlow*, 51 NY2d 181, 185 [1980]).

Here, the Arbitration Stipulation did not fix any time for issuance of the award (*see* NYSCEF Doc No. 15). But the Joint Letter, signed by each side's attorney and appearing on their letterheads, constituted a conditional modification of the parties' agreement to select Judge Conrad to arbitrate their dispute based on his delay in issuing an award.

Thus, the Joint Letter provided that if an award was not rendered by the November 15, 2020 deadline, the matter would be withdrawn from the Arbitrator's consideration and the parties would proceed to "re-arbitrate" the case before a "new arbitrator" (NYSCEF Doc No. 18; *accord* Petition, ¶ 3). Thus, the Joint Letter conditionally withdrew the matter from the Arbitrator, and after the November 15, 2020 deadline passed without issuance of an award, the withdrawal of jurisdiction from the Arbitrator became fully effective.

Because the Joint Letter constituted a mutual modification of the parties' agreement to arbitrate before Judge Conrad, the Court rejects petitioners' reliance on the unilateral letter of their counsel, dated November 6, 2020, wherein counsel expressed to the Arbitrator his clients' willingness to extend the November 15, 2020 deadline to December 6, 2020 if the Arbitrator "[felt] that still more time [was] needed" to prepare a reasoned decision (NYSCEF Doc No. 21).

Nor is there merit to petitioners' contention that respondents waived the November 15, 2020 deadline by failing to respond to their November 6, 2020 letter. The unilateral letter of petitioners' counsel expressed petitioners' willingness to agree to an extension if the Arbitrator felt he needed more time, but the Arbitrator did not respond to the letter or ask for more time. And once the parties' jointly established deadline of November 15, 2020 passed without issuance of the award and the parties' conditional agreement to divest the Arbitrator of jurisdiction became fully operative, respondents' counsel immediately advised the Arbitrator that his clients considered the arbitration to have been terminated via the Joint Letter and requested the Arbitrator to stop working on the decision (*see* NYSCEF Doc No. 22). Respondents restated this position again on November 17, 2020 (*see* NYSCEF Doc No. 23). There was no waiver.

The Court also rejects petitioners' argument that the effect of the Joint Letter (and subsequent communications with the Arbitrator) is a matter for the Arbitrator, not the court. The cases relied upon by petitioners involve the arbitrability of "questions with respect to the validity and effect of subsequent documents purported to work a modification or termination of the *substantive provisions* of [the parties'] original agreement[s]" where the parties had assented to broad arbitration clauses (*see Matter of Schlaifer*, 51 NY2d at 185 [emphasis added]; *see L & R Exploration Venture v Grynberg*, 22 AD3d 221, 222 [1st Dept 2005], *lv denied* 6 NY3d 749 [2005]).

In contrast, the parties' subsequent agreement here, the Joint Letter, pertained only to [*7]arbitration, and it did not "touch" or "implicate" (*L & R Exploration*, 22 AD3d at 222) any of the substantive provisions of any alleged contract between the parties. As the subsequent agreement pertained solely to arbitration, determination of the legal effect of that agreement is for the court to determine (*see Matter of All Metro Health Care Servs., Inc. v Edwards*, 57 AD3d 892, 893 [2d Dept 2008]; *see also Wolf v Wahba*, 164 AD3d 1405, 1407-1408 [2d Dept 2018]).**[FN6]**

Finally, petitioners argue that respondents have identified no "prejudice from the 17-day delay between the November 15, [2020] date for the decision and its issuance on December 2, 2020" (NYSCEF Doc No. 45, p. 6, citing *Scollar v Cece*, 28 AD3d 317 [1st Dept 2006]; *Matter of Westminster Constr. v Peconic Bay Golf*, 288 AD2d 231 [2d Dept 2001]).

The issue, however, is not the Arbitrator's mere lateness in rendering an award. Rather, based on the Arbitrator's persistent and unexplained delays in rendering an award, the parties lost confidence in whether the Arbitrator could provide them a "full opinion explaining the reasoning for any award" within an acceptable timeframe (Arbitration Stipulation, ¶ 11). For that reason, the parties jointly agreed to divest the Arbitrator of the power to decide their dispute unless he issued the award by November 15, 2020 (*see Rosario v Carrasquillo*, 88 AD2d 874, 874 [1st Dept 1982]). After that deadline came and went without issuance of an award and respondents notified the Arbitrator and petitioners that they considered the arbitration to have been terminated in accordance with the Joint Letter, the Arbitrator "exceeded his power" by purporting to render a decision (CPLR 7511 [b] [1] [iii]; *see Rosario*, 88 AD2d at 874).

The Court therefore concludes that the Arbitrator's decision must be vacated (*see id.*), and the matter must be remanded for hearing before another arbitrator (*see* CPLR 7511 [d];

Rosario, 88 AD2d at 874).[FN7]

CONCLUSION

Based on the foregoing, it is

ORDERED and **ADJUDGED** that petitioners' application to confirm the arbitration award is denied and the Petition is dismissed; and it is further

ORDERED and **ADJUDGED** that respondents' Cross Petition to vacate the arbitration award is granted; and it is further

ORDERED and **ADJUDGED** that the arbitration award, as set forth in the Decision of Hon. Francis G. Conrad (Ret.) dated December 1, 2020, as modified on December 8, 2020, is vacated in all respects; and it is further

ORDERED that this matter is remanded for hearing before another arbitrator; and it is further

ORDERED that, on or before **July 16, 2021**, the parties shall mutually select a new [*8]arbitrator, who shall preferably be both an attorney and an accountant, to serve as the sole arbitrator; and finally it is

ORDERED that if the parties cannot agree on a new arbitrator on or before July 16, 2021, then any party may commence a special proceeding in Queens County pursuant to CPLR 7504 to have the Court designate an arbitrator, and such application shall request that the arbitrator appointed be preferably both an attorney and an accountant.

This constitutes the Decision, Order & Judgment of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for respondents shall promptly serve notice of entry on all other parties entitled thereto.

Dated: Albany, New York
June 11, 2021

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 1-4, 9, 10-33, 35-50.

Footnotes

Footnote 1: The factual background is drawn from the Petition, the Cross Petition and this Court's prior Decision & Order in the pending proceeding to dissolve Gozzer Corp. (*see* pp. 3-4, *infra*), of which the Court takes judicial notice (*see Musick v 330 Wythe Ave. Assoc., LLC*, 41 AD3d 675, 676 [2d Dept 2007]).

Footnote 2: In their emails to the Arbitrator regarding alleged substantive errors in the Decision, respondents "continue[d] to reserve all rights as expressed in [their] prior letters and emails" (NYSCEF Doc No. 27).

Footnote 3: The Joint Letter was sent by regular mail, certified mail and email because the parties "had not been able to get [a]hold of [the Arbitrator] for an extended period of time" (Cooke Aff., ¶ 21 n 2). The certified mail return receipt returned by the Arbitrator contained a handwritten note: "I am offended!!" (NYSCEF Doc No. 19).

Footnote 4: The Arbitration Stipulation called for the Arbitrator to issue "a full opinion explaining the reasoning for any award" (¶ 11).

Footnote 5: Earlier on December 1, 2020, petitioners' counsel sent an email to the Arbitrator, stating that "[t]he day or two has turned into two weeks" (NYSCEF Doc No. 25). The Arbitrator responded that his decision "will be out today. I rewrote it" (*id*.).

Footnote 6: As stated above, the authorities cited by petitioners concern "broad" arbitration clauses (*see Matter of Schlaifer*, 51 NY2d at 184 ["(all) disputes, differences and controversies arising out of, under or in connection with this agreement"]). The parties' agreement here to arbitrate "the claims and counterclaims asserted in the Queens Action" (Arbitration Stipulation, ¶ 1) is far more limited.

Footnote 7: Given this determination, the Court need not reach respondents' alternative contention that the Arbitrator exceeded his authority under the Arbitration Stipulation and manifestly disregarded controlling law by refusing to abide by the Strike Order, which was affirmed on appeal during the pendency of the arbitration (*see Sparakis v Gozzer Corp.*, 177 AD3d 1011 [2d Dept 2019]).

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