

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

YARDIS CORPORATION and)	
THE LEADERSHIP CLUB, INC.,)	Civil Action
)	No. 88-CV-07211
Plaintiffs)	
)	
vs.)	
)	
PERRY SILVER and)	
RECIPROCAL MERCHANDISING)	
SERVICES,)	
)	
Defendants)	

* * *

APPEARANCES:

AARON POGACH, ESQUIRE
On behalf of Plaintiffs

JEFFREY D. SERVIN, ESQUIRE
On behalf of Defendants

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Petition to Vacate Arbitration Award, filed on behalf of defendants Perry Silver and Reciprocal Merchandising Services on November 23, 2004¹ and the Motion to Confirm Arbitrators' Award filed on behalf of Yardis Corporation and The Leadership Club, Inc. on

¹ Plaintiff's/Respondents' Answer in Opposition to Defendants'/Petitioners' Petition to Vacate Award on behalf of Yardis Corporation and The Leadership Club, Inc was filed December 2, 2004. The Supplemental Response of the Petitioners Perry Silver and Reciprocal Merchandising Services to the Response Filed by Yardis Corporation and the Leadership Club, Inc., was filed with leave of court on July 15, 2005.

December 14, 2004.² After oral argument held July 20, 2005, and for the reasons expressed below, we grant plaintiffs' Motion to Confirm Arbitrators' Award and deny defendants' Petition to Vacate Arbitration Award.

Furthermore, we confirm the October 20, 2004 Award of Arbitrators. We enter judgment in favor of plaintiffs Yardis Corporation and The Leadership Club, Inc. and against defendants Perry Silver and Reciprocal Merchandising Services in the amount of \$75,000, together with statutory interest from October 21, 2004.

Specifically, we conclude that defendants have not met their burden of proof that there was any misconduct, partiality, corruption or any other misbehavior by the arbitrators which resulted in prejudice to the rights of any party, or that the arbitrators exceeded their powers or manifestly disregarded the law in this matter.

Jurisdiction and Venue

This action is before the court on diversity jurisdiction.³ See 28 U.S.C. § 1332. Venue is proper because the underlying arbitration was conducted in this district by the

² The Answer and Response of Perry Silver and Reciprocal Merchandising Services was filed December 28, 2004.

³ At oral argument the parties agreed that jurisdiction in this matter is based upon the diversity of citizenship of the parties and an original amount in controversy that exceeded \$75,000.

American Arbitration Association in Philadelphia, Pennsylvania.
28 U.S.C. §§ 118, 1391.

Procedural History

A Complaint was originally filed in this action on September 19, 1988. Since that time this case has proceeded through a long and tortured history of delay which is unacceptable under our system of justice.

The matter was originally assigned to our colleague, then United States District Judge, now Senior United States District Judge Thomas N. O'Neill. By Order dated February 2, 1989 the matter was transferred to our former colleague, the late United States District Judge Jay C. Waldman.

By Order of Judge Waldman dated December 4, 1989, plaintiff's Motion to Compel Commercial Arbitration was granted, and the matter was referred to the American Arbitration Association for commercial arbitration.

The case was placed into civil suspense on November 1, 1990 and removed by Order dated January 11, 1991. The matter was deemed eligible for court-sponsored arbitration by Order dated February 4, 1991 and was referred to arbitration by Order dated February 11, 1991.

There was no further docket activity until August 14, 1996 when the matter was reopened. (There is no indication that the case was ever placed back into civil suspense from 1991 to

1996.) The matter was placed back into suspense on December 17, 1996. Throughout early 1998 until late 2000 there were a number of docket entries, but the case remained in civil suspense.

Between 1989 and the late 1990's the parties proceeded through commercial arbitration, a failed settlement and years of inactivity.

By Order of Judge Waldman dated December 1, 2000 and filed December 4, 2000, plaintiffs' motion to compel arbitration was granted. (A previous similar motion had been denied by Judge Waldman on February 4, 2000.) The Order required the parties to each select an arbitrator by December 21, 2000 and proceed "forthwith" with arbitration of their dispute pursuant to the rules of the American Arbitration Association.

Judge Waldman's December 1, 2000 Order and a letter from Raymond Rosenberg to Judge Waldman were filed contemporaneously on December 4, 2000. There was no further docket activity in this matter after that until June 11, 2003. At that time this matter was reassigned to the undersigned (because of the untimely death of Judge Waldman) by Order dated June 10, 2003 and filed June 11, 2003. The next docket activity was the filing of defendant's motion to dismiss on November 5, 2003.

By Order of the undersigned dated January 22, 2004 this matter was removed from civil suspense. Moreover, by separate

Hearing Scheduling Order dated January 22, 2004 the matter was scheduled for hearing and plaintiffs were directed to file a brief in support of their response to the within motion.

By footnoted Order of the undersigned dated March 29, 2004 and filed March 30, 2004, defendant's motion to dismiss was denied and the parties were directed to proceed to arbitration to be completed by September 30, 2004. We retained jurisdiction for the purposes of enforcing the arbitration award.

Facts

Based upon the pleadings, record papers, affidavits, exhibits attached to the respective petitions, and exhibits admitted without objection at oral argument, the following are the pertinent facts:⁴

On July 19, 2004 the arbitration hearing was commenced before plaintiffs' chosen arbitrator Clifford Brenner,

⁴ We conclude that the record in this matter consists of the following documents: (1) the defendants' undated Answer, Affirmative Defenses and Counterclaim filed November 22, 1988; (2) the September 22, 1987 Consulting Agreement (Exhibit D-7 at the arbitration hearing and presented to the court at oral argument); (3) The Award of Arbitrators dated October 21, 2004 (attached as an unnumbered exhibit to plaintiffs' Motion to Confirm Arbitrators' Award and Exhibit A to defendants' Memorandum of Law in Support of Petition to Vacate); (4) the Disposition of Application for Modification of Award dated December 9, 2004; (5) e-mail of Joel Neulight to Jeffrey D. Servin, Esquire dated December 10, 2004 (Exhibit B to the Supplemental Response of the Petitioners Perry Silver and Reciprocal Merchandising Services to the Response Filed by Yardis Corporation and The Leadership Club, Inc.); (6) Letter dated December 9, 2004 from Michelle Boucher of the American Arbitration Association to Aaron Pogach, Esquire and Jeffrey Servin, Esquire (Exhibit A to the Supplemental Response of the Petitioners Perry Silver and Reciprocal Merchandising Services to the Response Filed by Yardis Corporation and The Leadership Club, Inc.); and (7) the unsworn Affidavit of Joel Neulight dated November 21, 2004 (Exhibit C to defendants' Memorandum of Law in Support of Petition to Vacate).

defendants' chosen arbitrator Joel S. Neulight and a neutral arbitrator Jerry Schuchman, Esquire. Further hearings were conducted on plaintiff's claims from July 26 to 30, 2004. On July 30, 2004 the arbitrators heard closing arguments on plaintiff's claims and directed that briefs be filed. On September 27, 2004 a hearing was conducted on defendants' counterclaims. Upon completion of the hearing, closing arguments on the counterclaims were heard.

On September 28, 2004 the arbitration panel met to deliberate. On October 20, 2004, by a 2 to 1 vote, the Award of Arbitrators was issued finding in favor of plaintiffs and against defendants on both plaintiffs' claims and defendants' counterclaims, and awarding plaintiffs \$75,000. Arbitrators Brenner and Schuchman voted in favor of plaintiffs. Arbitrator Neulight filed a Dissenting Opinion indicating that in his opinion plaintiffs were not entitled to anything.

On November 3, 2004 plaintiffs filed a motion with the arbitrators seeking modification of the award requesting interest be awarded from September 19, 1988, the original filing date of the Complaint in this matter. On November 19, 2004 Mr. Neulight sent an e-mail to Michelle Boucher at the American Arbitration Association indicating that no interest should be awarded because that was one of the few issues that the arbitration panel as a

whole had unanimously agreed upon at the September 28, 2004 deliberations.

On December 9, 2004 the arbitrators modified the arbitration award to reflect that plaintiff was entitled to interest at the Pennsylvania statutory rate from the date of the original Award of Arbitrators, but not from the date of the filing of the original Complaint in 1988.

On November 23, 2004 defendants filed their petition to vacate the arbitration award. On December 14, 2004 plaintiffs filed their motion to confirm the arbitration award. On December 20, 2004 defendants filed a motion for leave to file a supplemental pleading based upon the fact that their petition to vacate was filed prior to the arbitration panel's amended award. By Order of the undersigned dated July 15, 2005 we granted defendants' request for a supplemental pleading and the supplemental pleading was filed that same date.

Standard of Review

The parties disagree on the standard of review in this matter. Defendants contend that review of the arbitration award in this matter is controlled by state law pursuant to the Pennsylvania Uniform Arbitration Act.⁵ On the other hand,

⁵ 42 Pa.C.S.A. §§ 7301-7320.

plaintiffs cite both to the Pennsylvania and Federal Arbitration Act.⁶

Neither party cites any authority for the proposition of which law controls. We conclude that this matter is controlled by the Federal Arbitration Act. However, in the event that we are mistaken, and because both state and federal law are very similar, we analyze the issues involved under both Pennsylvania and federal law.

Under federal law, review of an arbitration award is narrowly circumscribed. Sections 10(a) and (b) of the Federal Arbitration Act list the circumstances under which the court may vacate an arbitration award:

(a)(1) where the award was procured by corruption, fraud or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time

⁶ 9 U.S.C. §§ 1-16.

within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10(a) and (b).

In addition, Section 7314 of the Pennsylvania Uniform Arbitration Act provides:

42 Pa.C.S.A. § 7314. Vacating award by court

(a) General rule.-

(1) On application of a party, the court shall vacate an award where:

(i) the court would vacate the award under section 7341 (relating to common law arbitration) if this subchapter were not applicable;

(ii) there was evident partiality by an arbitrator appointed as a neutral or corruption or misconduct in any of the arbitrators prejudicing the rights of any party;

(iii) the arbitrators exceeded their powers;

(iv) the arbitrators refused to postpone the hearing upon good cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 7307 (relating to hearing before arbitrators), as to prejudice substantially the rights of a party; or

(v) there was no agreement to arbitrate and the issue of the existence of an agreement to arbitrate was not adversely determined in the proceedings under section 7304 (relating to court proceedings to compel or stay arbitration) and the appellant-party raised the issue of the existence of an agreement to arbitrate at the hearing.

42 Pa.C.S.A. § 7314.

In addition, a judicially created ground for vacating the arbitration award exists. The Supreme Court has stated that arbitration awards can be vacated if they are in "manifest disregard of the law". Mathers v. Sherwin Williams Company, Inc., No. Civ.A. 97-5138, 2000 WL 311030 at *6 (E.D.Pa. Mar. 27, 2000)(Broderick, S.J.), quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942, 115 S.Ct. 1920, 1927, 131 L.Ed.2d 985, 992 (1995).

Discussion

There is a strong presumption under the Federal Arbitration Act in favor of enforcing arbitration awards. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Whenever possible, arbitration awards should be construed to uphold their validity because a contrary course would result in the substitution of the judgment of the court for the judgment of the arbitrators chosen by the parties and that would make the award itself the beginning, not the end, of litigation. Delta Mine Holding Company v. AFC Coal Properties, Inc., 280 F.3d 815, 823 (citing Burchell v. Marsh, 58 U.S. (17 How.) 344, 15 L.Ed. 96 (1854)).

The Federal Arbitration Act codifies the desire of Congress to uphold private arbitration agreements and awards

generated from those agreements. “[A] court must scrupulously honor the bargains implicit in such agreements and interfere only when an award is severely problematic.” Brentwood Medical Associates v. United Mine Workers of America, 396 F.3d 237, 238-239 (3d Cir. 2005).

Similarly, in Pennsylvania every presumption is in favor of the arbitration award’s validity. A party may only succeed in vacating an arbitration award if it is alleged and proven, by “clear and convincing evidence” that they were “denied a hearing or that there was fraud, misconduct, corruption or some other irregularity of this nature on the part of the [arbitrators] which caused [them] to render an unjust, inequitable or unconscionable finding.” Parking Unlimited, Inc. v. Monsour Medical Foundation, 299 Pa.Super. 289, 293, 445 A.2d 758, 760-761 (1982). (Citations omitted.)

Defendants contend that the arbitration award in this matter should be vacated because the panel engaged in misconduct which prejudiced defendants’ rights.

Defendants assert that the arbitration award should be vacated because there was no deliberation process engaged in by the arbitrators. Defendants rely on the Affidavit of their arbitrator Joel S. Neulight. Specifically, defendants assert that there was no review of the pleadings, briefs, exhibits, the notes taken at the hearings, no discussion of the issues,

elements of the causes of action or any other matters.

In addition, defendants contend that the neutral arbitrator Jerry Shuchman, Esquire failed in his role as the neutral. Defendants aver that Mr. Shuchman had a duty to guide the arbitration panel through a deliberation process when all three arbitrators were assembled together and to insure that the arbitrators looked at all the evidence, the merits of the claims and counterclaims and examined the credibility of witnesses.

Defendants contend that this process should have taken at least one whole day and it appears that the process was one-half hour. Accordingly, defendants assert that the arbitration award should be vacated, based upon a complete lack of deliberation.

In addition, defendants contend that Mr. Neulight was not involved in the determination of the amended award at all.

Finally, defendants assert that if the court vacates the arbitration award, the American Arbitration Association cannot be trusted to perform this function again, and that a retired judge should be appointed as the arbitrator and be required to hear the evidence and complete an informed decision, including making written findings of fact, conclusions of law and discussion of the reasons for the decision.

Plaintiffs contend that there was nothing wrong with the process engaged in by the arbitrators in this matter.

Plaintiffs assert that the procedure was correctly conducted in all respects because the panel included one arbitrator selected by each party and a neutral. Moreover, the panel heard opening statements on July 19, 2004, and testimony on July 26, 27, 28 and 30, 2004.

On July 30, 2004 the panel conducted closing arguments on plaintiffs' claims and permitted the parties to brief the issues. Later, on September 27, 2004 the parties returned to conduct a hearing on defendants' counterclaims, with closing arguments on the counterclaims at the end of that day.

Plaintiffs further contend that there is no fraud, corruption, bias or any other reason to vacate the award and that the award was the product of thoughtful consideration. In addition, plaintiffs assert that there is no requirement for deliberations to be a certain minimum length, or that they be conducted a particular way.

Plaintiffs assert that the essence of all of this is that the plaintiff's arbitrator and the neutral agreed on an outcome, and the arbitrator appointed by defendants disagreed with the outcome. There is nothing new in that scenario. Neither plaintiffs nor defendants may be happy with the resolution, but it was the informed decision of the panel.

Thus, plaintiffs maintain that this court should confirm the arbitration award. For the following reasons we

agree with plaintiffs, disagree with defendants, and conclude that defendants' motion to vacate should be denied and plaintiffs' motion to confirm should be granted.

Defendants rely on the unsworn Affidavit of its selected arbitrator Joel S. Neulight. Defendants want this court to simply accept the averments in the Affidavit and end our inquiry. However, to do so would require the court to find Mr. Neulight credible without the benefit of assessing his demeanor and to disregard the strong legal presumption that the arbitration award is valid.

Defendants never requested the court to conduct a hearing in this matter, nor sought any information from the other two arbitrators. Accordingly, we decline to determine this matter solely on the basis of the Affidavit of Mr. Neulight.

Even if we were to consider the Affidavit of Mr. Neulight, we conclude that it is far from "clear and convincing evidence" of any misconduct on the part of the other two arbitrators.

Mr. Neulight's Affidavit generally avers that the deliberation only took one-half hour (Paragraph 4); the arbitrators did not collectively review the pleadings, briefs, exhibits or notes taken at the hearing (Paragraphs 5(b)(1-4)); there was no discussion of the issues of fraud or the elements thereof (Paragraph 5(b)(5)), or discussion of the issues of

breach of contract in either plaintiff's claim or defendants' counterclaim (Paragraphs 5(b)(6 and 7)). Finally, Mr. Nuelight avers that there was no discussion of the witnesses or their credibility, any specific exhibits or the weight to be given them (Paragraphs 5(b)(7-9)).

On the other hand, Paragraph 5(b)(10) of the Neulight Affidavit clearly indicates that there were deliberations and discussions between the arbitrators in this matter.

Paragraph 5(b)(10) states:

As I remember the short time period we met, the only discussion involved was that Mr. Brenner raised the position that Yardis had paid out \$275,000 and Mr. Silver had suffered a \$150,000 loss; and that the award should be \$125,000. I strongly objected to this and basically concluded the original claim should be decided in favor of the Petitioners and that the Petitioners should also prevail in the counterclaim, and at the very least that the original claim and the counterclaim should cancel each other out and Yardis was entitled to zero. Thereafter, there was a discussion between the three of us, and the final award of \$75,000 was negotiated; with no deliberation, discussion or review of the law or facts. In connection with that award. There was a dissent filed by me, as set forth in the order of October 27, 2004.

This Affidavit demonstrates that there were deliberations conducted by the arbitrators in this matter, including discussion of issues, discussion and debate on positions, and evaluation of damages. In addition, this paragraph clearly reveals a difference of opinion between the two

arbitrators selected by the parties on the outcome of the case. One reasonable inference that may be drawn based upon the Award of Arbitrators itself is that Attorney Schuchman agreed at least in part with Mr. Brenner because those two arbitrators ruled in favor of plaintiffs. Finally, Paragraph 5(b)(10) clearly states that the \$75,000 amount of the award "was negotiated".

Accordingly, upon review of the Affidavit of Mr. Neulight, we conclude that defendant has not proven by "clear and convincing evidence", Parking Unlimited, supra, that there was any misconduct on the part of the arbitrators. Furthermore, because the basis of defendants' opposition to plaintiffs' motion to confirm the arbitration award is the same as the basis in support defendants' petition to vacate the award, and because we have concluded that defendants' cannot prevail on their petition to vacate, we grant plaintiffs' motion to confirm the arbitration award.

Furthermore, regarding interest on the award, it appears that all three arbitrators agreed that interest would not run from the time of the filing of the Complaint in September 1988. Mr. Neulight sent an e-mail to Michelle Boucher at the American Arbitration Association indicating that the arbitrators had agreed that there would be no interest awarded. What arbitrators Brenner and Schuchman granted to plaintiffs was only the statutory interest to which plaintiffs are entitled under

Pennsylvania law. The arbitrators have no discretion to deny the successful plaintiffs such post-judgment interest.

Under Pennsylvania Law, "a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award." 42 Pa.C.S.A. § 8101. On an arbitration award, post-judgment interest begins to run from the date of the award. See Perel v. Liberty Mutual Insurance Company, 839 A.2d 426 (Pa.Super. 2003).

Moreover, post-judgment interest is allowed on any money judgment in a civil case recovered in a district court. See 28 U.S.C. § 1961(a). "[A]warding post-judgment interest is not a 'reward,' but rather just compensation to ensure that a money judgment will be worth the same when it is actually received as it was when it was awarded." Christian v. Joseph, 15 F.3d 296, 298 (3d Cir. 1994). (Citations omitted.)

Accordingly, we conclude that the arbitrators did not commit any misconduct by awarding plaintiffs post-trial interest in this matter.

Conclusion

For all the foregoing reasons, we grant plaintiffs' motion to confirm the arbitration award and deny defendants' petition to vacate the arbitration award. Furthermore, by the Order accompanying this Memorandum, we direct the Clerk of Court

to enter Judgment in favor of plaintiffs Yardis Corporation and the The Leadership Club, Inc. and against defendants Perry Silver and Reciprocal Merchandising Services in the amount of \$75,000 plus any applicable statutory interest from October 21, 2004, the date of entry of the award.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

YARDIS CORPORATION and)	
THE LEADERSHIP CLUB, INC.,)	Civil Action
)	No. 88-CV-07211
Plaintiffs)	
)	
vs.)	
)	
PERRY SILVER and)	
RECIPROCAL MERCHANDISING)	
SERVICES,)	
)	
Defendants)	

O R D E R

NOW, this 28th day of September, 2005, upon consideration of the Petition to Vacate Arbitration Award, filed on behalf of defendants Perry Silver and Reciprocal Merchandising Services on November 23, 2004;⁷ upon consideration of the Motion

⁷ Plaintiff's/Respondents' Answer in Opposition to Defendants'/Petitioners' Petition to Vacate Award on behalf of Yardis Corporation and The Leadership Club, Inc was filed December 2, 2004. The Supplemental Response of the Petitioners Perry Silver and Reciprocal

to Confirm Arbitrators' Award filed on behalf of Yardis Corporation and The Leadership Club, Inc. on December 14, 2004;⁸ upon consideration of the briefs of the parties; after oral argument held July 20, 2005; and for the reasons expressed in the accompanying Memorandum,

IT IS ORDERED that defendants' Petition to Vacate the Arbitration Award is denied.

IT IS FURTHER ORDERED that plaintiffs' Motion to Confirm Arbitrators' Award is granted.

IT IS FURTHER ORDERED that the Award of Arbitrators dated October 21, 2004, and modified December 9, 2004, is confirmed.

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter judgment in favor of plaintiffs Yardis Corporation and the The Leadership Club, Inc. and against defendants Perry Silver and Reciprocal Merchandising Services in the amount of \$75,000 plus any applicable statutory interest from October 21, 2004.

IT IS FURTHER ORDERED that the Clerk of Court shall mark this matter closed for statistical purposes.

Merchandising Services to the Response Filed by Yardis Corporation and the Leadership Club, Inc., was filed with leave of court on July 15, 2005.

⁸ The Answer and Response of Perry Silver and Reciprocal Merchandising Services was filed December 28, 2004.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge