

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

DOCKETED

KLINE & SPECTER, P.C.,	:	July Term 2007	AUG 7 - 2013
Plaintiff,	:		
v.	:	No. 1922	C. HART
DONALD E. HAVILAND, JR.,	:	COMMERCE PROGRAM	CIVIL ADMINISTRATION
Defendant.	:		
	:	Control Nos. 13032565/13040746	

ORDER

AND NOW, this 6th day of August, 2013 upon consideration of Kline & Specter, P.C.'s Petition to Confirm the Arbitration Award dated March 2, 2013 and Donald E. Haviland, Jr.'s Petition to Partially, Vacate, Modify or Correct the Decisions and Awards of the Arbitration Panel and all responses thereto, it hereby is **ORDERED** that the Petition to Confirm the Arbitration Award of March 2, 2013 is **Granted** and the Panel's Award is hereby **Confirmed**. It is further **ORDERED** that Judgment is entered in the amount of \$210,220.95 plus 6% annual interest from the date fees were received by Donald E. Haviland, Jr. in conformity with the arbitration award.

The Petition to Partially, Vacate, Modify or Correct the Decisions and Awards of the Arbitration Panel is **Denied**.

BY THE COURT,

Kline&Specter Pc Vs Hav-ORDOP



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PATRICIA A. McINERNEY, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

KLINE & SPECTER, P.C.,	:	July Term 2007
Plaintiff,	:	
v.	:	No. 1922
DONALD E. HAVILAND, JR.,	:	
Defendant.	:	COMMERCE PROGRAM
	:	
	:	Control Nos. 13032565/13040746

OPINION

Presently before the court is Kline & Specter, P.C.’s (hereinafter “Kline & Specter”) petition to affirm the Arbitration Panel’s award dated March 4, 2013 and Defendant Donald E. Haviland, Jr.’s (“hereinafter “Haviland”) petition to partially vacate, modify or correct the Decision and Awards of the Arbitration Panel dated May 18, 2011 and March 4, 2013.

Haviland is a former associate of Kline & Specter employed from October 15, 2001 to September 7, 2006. On July 16, 2007, Kline & Specter filed a Petition for the Appointment of Arbitrator seeking to arbitrate its claims with Haviland arising from alleged violations of his employment agreement. On March 20, 2008, after a failed attempt at mediation, the court granted Kline & Specter’s Petition for the Appointment of an Arbitrator. The court directed the parties to appoint an arbitrator and to have the appointed arbitrators select a neutral. The panel of arbitrators consisted of Louis Fryman, Esquire, Chair, Ralph Wellington, Esquire and the Honorable Joseph Del Sole, President Judge Emeritus of the Pennsylvania Superior Court.

On June 12, 2009, Kline & Specter filed a Second Amended Arbitration Complaint alleging Haviland breached his employment agreement by not paying claimed referral fees and costs in files that Kline & Specter asked Haviland to take with him to his new firm. The arbitration hearing, which proceeded under the Arbitration Act of 1927, was held on October 12-

13, 2009, December 16-17, 2009, September 27-28, 2010, January 10, 2011, February 28, 2011 and March 1, 2011.

On May 11, 2011, the Panel issued its decision and award. Two of the three arbitrators found that Haviland breached the employment agreement by failing to pay referral fees in connection with cases that he took with him when he left Kline & Specter. Judge Del Sole dissented finding no breach occurred and therefore no referral fees were owed.

The Decision and Award provided in relevant part as follows:

Donald E. Haviland, Jr. shall pay Kline & Specter the following amounts in the below referenced cases [footnote omitted], representing one-third of the gross attorneys' fees received by Mr. Haviland, as well as six percent (6%) annual interest from the date indicated until the date of payment by Mr. Haviland:

· Lupron Blues	\$258, 983.24	May 2, 2007
· PA AWP-Glaxo Smith Kline	\$ 91,749.07	June 30, 2007
·PA AWP –Abbott	\$189,286.72	November 18, 2008
·PA AWP-Baxter	\$469,110.16	October 31, 2009
·PA AWP-AstraZeneca	\$372,500.63	July 22, 2010
·PA AWP-TAP	\$307,486.00	December 28, 2010
·PA AWP-Dey	\$233,333.00	February 1, 2011

The Majority Panel also required the following:

Mr. Haviland shall also provide Kline & Specter distribution sheets of amounts disbursed, and pay to Kline & Specter one-third (1/3) of the gross attorneys' fees received by him in the following additional matters presently known to the panel, as well as six percent (6%) annual interest from the date he received the fees until the date of his payment to Kline & Specter:

- PA AWP- Aventis
- PA AWP-Bayer
- PA AWP-Bristol-Myers Squibb
- PA AWP-Johnson & Johnson
- PA AWP-Pharmacia and Pfizer
- PA AWP-Schering Plough

On June 16, 2011, Kline & Specter filed a petition to confirm the arbitration award. On June 17, 2011, Haviland filed a petition to partially vacate, modify or correct the award. On

September 20, 2011, Haviland paid Kline & Specter \$5,739, 490.15 for fees received by him in connection with settlements in (a) the *Lupron Blues* case, *Bluecross and Bluesheild of Alabama and Bluecross Blueshield of Michigan v. TAP Pharmaceutical Products, Inc., et. al.*, 2:06- CV- 536-MEF (M.D. Ala.), and (b) with defendants *TAP, Dey, Astra Zeneca, Abbott, Baxter, and Aventis in the PA AWP* case, *Commonwealth of Pa v. Tap Pharmaceutical Products, Inc., et. al.*, 212 MD 2004 (Pa. Commwlth. Ct.).

At or near the time of payment, both parties signed a Stipulation to Confirm Arbitration Award and Enter Judgment which read in pertinent part as follows:

It is hereby stipulated that the Decision and Award of the Arbitration Panel is accepted and confirmed by both parties and that judgment shall be entered in accordance with this Decision and Award. The parties will immediately withdraw their outstanding motions and petitions.

Judgment was entered on October 3, 2011.

On February 15, 2012, Kline & Specter filed a Petition with this court to re-open the arbitration proceedings against Haviland alleging Haviland perpetuated a fraud on the panel by providing false information regarding the fees received by him. Kline & Specter alleged that Haviland overstated the amount of fees he paid to his co-counsel, Adam S. Levy, Esquire by \$603,662.85 and underreported his net fees in PA AWP by that same amount. Haviland opposed the petition. On March 21, 2012, the court granted Kline & Specter's petition and re-opened the arbitration proceedings and referred the matter back "to the presently constituted arbitration panel."

On March 4, 2013, after hearing evidence on May 1, 2012 and September 19-20, 2012, the panel, issued a decision and award in the re-opened proceeding. Once again Judge Del Sole dissented. The Majority Panel Decision and Award provides as follows:

6. The Majority Panel finds that evidence has been presented that some of the distribution sums set forth in previously submitted documentation relied upon by the Majority Panel in crafting its May 18, 2011 Decision and Award did not accurately reflect funds withheld from or paid by Mr. Levy to Mr. Haviland.

7. In consideration of this evidence, and in light of the fact that the parties remain bound by the terms of Paragraph 5 of their contract executed on November 9, 2001, the Majority Panel hereby supplements Paragraph 4 of its May 18, 2011 Decision and Award to incorporate the following sums:

- a. The following sums are incorporated:
 - i. \$18,395 representing 1/3 of the fees retained by Mr. Haviland from Mr. Levy in connection with the Abbott settlement in the PA AWP case;
 - ii. \$15,881.40, representing 1/3 of the fees retained by Mr. Haviland from Mr. Levy in connection with the Baxter settlement in the PA AWP case;
 - iii. \$22,222.22, representing 1/3 of the fees retained by Mr. Haviland from Mr. Levy in connection with the AstraZeneca settlement in the PA AWP case;
 - iv. \$5,394.14 representing 1/3 of the fees retained by Mr. Haviland from Mr. Levy in connection with the TAP settlement in the PA AWP case.
 - v. \$11,100.00, representing 1/3 of the fees retained by Mr. Haviland from Mr. Levy in connection with the Dey settlement in the PA AWP case; and
 - vi. \$128,228.06, representing 1/3 of the fees retained by Mr. Haviland from Mr. Levy in connection with the Aventis et al. settlement in the PA AWP case.
- b. In accordance with the Panel's May 18, 2011 Decision and Award, Mr. Haviland shall provide to Kline & Specter one-third (1/3) of the gross attorneys' fees received by him, as described above, as well as six percent (6%) annual interest from the date he received those fees until the date of his payment to Kline & Specter.
- c. This supplement applies to any portion of fees retained and/or withheld by Mr. Haviland that are declared to be fee distributions to Mr. Levy in connection with the cases described in the Panel's May 18, 2011 Decision and Award.

On March 15, 2013, Kline & Specter filed a petition to confirm the arbitration award. On April 4, 2013, Haviland filed a petition to vacate, modify and correct the arbitration award of

March 4, 2013 as well as the Arbitration Award of May 18, 2011. These petitions are presently before the court and are ripe for determination.

Discussion

At issue in the case *sub judice* is whether this court should confirm the arbitration decision and award of this panel dated March 4, 2013 or whether this court should partially vacate, modify or correct the Decisions and Awards of March 4, 2013 Award and the May 18, 2011 Award. Haviland's Petition to partially vacate, modify and correct the Decision and Award of May 18, 2011 is denied. As is evident from the record, the court re-opened the arbitration proceedings for a limited purpose only to determine if the award should be modified to include the undisclosed fees received by Haviland. The arbitration proceeding was not re-opened to reconsider the Majority Panel's interpretation of the employment agreement. The matter regarding the interpretation of the employment agreement is final. Haviland clearly accepted the Majority Panel's May 18, 2011 Decision and Award by agreeing to the stipulation to confirm the award and enter judgment. Haviland paid the referral fee and withdrew all motions challenging the Decision and Award. Based on the foregoing, Haviland is precluded from challenging the May 18, 2011 Decision and Award.

Haviland's petition to partially vacate, modify and correct the Award and Decision of March 8, 2013 is also denied. This matter proceeded to arbitration under the Arbitration Act of 1927. The Act of 1927, which has been repealed and replaced by the Act of 1980, 42 Pa. C. S. A. § 7301-7320, allowed trial courts to grant relief from an arbitration award where the award was legally erroneous.¹ The Act of 1980 sets forth a narrower base for vacating, modifying and/or correcting statutory arbitration awards which eradicated the trial court's power to review

¹ *Nationwide Mut. Ins. Co. v. Heintz*, 804 A.2d 1209 (2002)(citing 5 P.S. §171 (d) (1927)(repealed)).

arbitration awards for an error of law.² Although the Act of 1980 eradicated the trial court's power to review arbitration awards for an error of law, it preserved the scope of review for arbitration agreements under the Act of 1927.³ Specifically, 42 Pa. C. S. § 7302(d)(2) states as follows:

(2) Where this paragraph is applicable a court in reviewing an arbitration award pursuant to this subchapter shall, notwithstanding any other provision of this subchapter, modify or correct the award where the award is contrary to law and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict.⁴

Hence, under this section, a trial court may modify or correct an award where the award is “contrary to law” and is such that that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict. This court finds no error of law.

In the case *sub judice*, the Majority Panel's March 4, 2013 Decision and Award arises from an inconsistency contained in some of the distribution sheets produced during the initial arbitration proceeding relied upon by the panel in issuing its May 18, 2011 Award and Decision. The record before the court demonstrates that during the initial arbitration proceeding, Haviland testified that he paid a portion of the gross fees awarded in the PA AWP case to his various co-counsel, including payments to Adam S. Levy, Esquire. According to Haviland, these payments to Levy reduced Haviland's net or realized fees.

On October 1, 2009 and again on October 7, 2009, the Majority Panel ordered Haviland to produce information responsive to Kline & Specter's interrogatories regarding fees received in

² *Id. citing Knarr v. Erie Ins. Exchange*, 555 Pa. 211, 723 A.2d 664, 665 (1999).

³ See 42 Pa. C. S. A. § 7302 (d)(2).

⁴ *Id.*

departed files including the PA AWP case. In response to these requests, Haviland produced a distribution sheet of the settlement with the GSK defendants in the PA AWP case indicating the net fee to him of \$258,922.91 and the one third referral fee of \$16,324.28 retained by him from Levy, totaling \$275, 247.19. The Majority Panel considered this referral fee as part of Haviland's net fee and awarded Kline & Specter one third of \$275, 247.19 or \$91, 749.07.

The Majority Panel specifically required Haviland to provide to Kline & Specter distribution sheets of amounts disbursed, and pay to Kline & Specter one-third (1/3) of the gross attorneys' fees received by him in the PA AWP- Aventis, PA AWP-Bayer, PA AWP-Bristol-Myers Squibb, PA AWP-Johnson & Johnson, PA AWP-Pharmacia and Pfizer PA AWP-Schering Plough as well as six percent (6%) annual interest from the date he received the fees until the date of his payment to Kline & Specter. Hence, Haviland had an ongoing duty under the Decision and Award to produce accurate distribution sheets.⁵

The distribution sheets, however, provided by Haviland overstated the amount of fees he paid to Levy by \$605,592.56. During the re-opened proceeding, Levy testified about the fees he was actually paid and how those fees differed from the amounts reported in the documents produced by Haviland to Kline & Specter. Based on this evidence presented to the panel, the Majority Panel concluded as a matter of fact, after weighing all the evidence, that some of the distribution sums set forth in the previously submitted documentation to the Panel did not accurately reflect funds withheld from or paid by Levy or Haviland.

Haviland argues the majority panel's decision to modify the award based on the inconsistency was "contrary to law" since a finding of fraud should have been made to justify the modification. This court does not agree. The Majority Panel merely supplemented its prior decision and award to accurately reflect the funds withheld. The panel members' factual finding

⁵ See paragraph 4 of the majority panel's May 18, 2011 Decision and Award.

that some of the distribution sums set forth in previously submitted documentation did not accurately reflect funds withheld from or paid by Levy to Haviland, adequately supported by the record, is not subject to review by this court. This court will not reweigh the evidence considered by the Majority Panel to determine if a mistake of fact was made regarding the fees. While 42 Pa.C.S.A. § 7302(d)(2) does provide a legislative mandate for reviewing an arbitration panel's alleged errors of law, it does not allow expansive *de novo* review of an arbitration panel's factual conclusions. Here, the Majority Panel made a factual finding that an inconsistency existed and corrected the inconsistency. Consequently, Haviland's petition to partially vacate, correct and modify is denied since the panel's decision and award is not contrary to the law.⁶

Lastly, Haviland attempts to unwind the arbitration decisions and awards by alleging a impropriety on the part of one of the arbitrators. Specifically, Haviland alleges that during the arbitration process Wellington concurrently represented the Commonwealth in the underlying case where the referral fee was at issue. The court is not persuaded that any impropriety existed.

In 2008, The Commonwealth of Pennsylvania instituted suit against Janssen Pharmaceutica, Inc. ("Janssen") seeking to recover amounts paid through Medicaid and PACE for prescriptions for off-label use, and retained the Texas Law Firm of Bailey Perrin Bailey, LLP to represent it in that matter. Janssen made a motion to disqualify Bailey Perrin Bailey, LLP alleging the firm's representation violated separation of powers and due process. Wellington served as an attorney for the Commonwealth after the motion to disqualify was filed by Janssen. At the time the motion to disqualify was filed, Haviland represented the Commonwealth in the PA AWP matter.

⁶ Indeed, on application of a party to the arbitrators, the arbitrators may modify or correct the award if there was an evident miscalculation of figures, an evident mistake in the description of any person, thing or property referred to in the award or the arbitrators awarded upon a matter not submitted to them or for the purpose of clarifying the award. See 42 Pa. C. S. A §§ 7311, 7315 (a)(1) and (2).

A review of the record demonstrates that there is no evidence of partiality or corruption by Wellington. No evidence was presented that Wellington's representation of the Commonwealth was adverse to Haviland's representation. Moreover, no evidence was presented that Wellington's representation of the Commonwealth was limited by his role in this arbitration. Wellington was not involved in the underlying claims bought by the Commonwealth against Janssen or the fee dispute between the instant parties.

CONCLUSION

Based on the foregoing, Haviland's Petition to Vacate, Correct and Modify the Arbitration Panel's Decisions and Awards dated May 18, 2011 and March 4, 2013 is denied. Kline & Specter's Petition to Confirm the Arbitration Panel's Decision and Award dated March 4, 2013 is granted. It is further **ORDERED** that Judgment is entered in the amount of \$210,220.95 plus 6% annual interest from the date fees were received by Donald E. Haviland, Jr. in conformity with the arbitration award.

BY THE COURT,


PATRICIA A. McINERNEY, J.