

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

MARVIN LUNDY, ESQUIRE	:	JUNE TERM, 2002
	:	
	:	
Petitioner	:	No. 0932
	:	
v.	:	COMMERCE CASE MANAGEMENT
	:	PROGRAM
DONALD F. MANCHEL, ESQUIRE	:	
	:	
Respondent	:	Control No. 070322

ORDER and MEMORANDUM

AND NOW, this 21st day of AUGUST, 2002, upon consideration of the Preliminary Objections filed by Respondent, Donald F. Manchel, Esquire to the Petition to Vacate or Modify Arbitration Award filed by Petitioner, Marvin Lundy, Esquire, the Petitioner's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and **DECREED** that said Preliminary Objections are **SUSTAINED** in part and **DENIED** in part, and that the Petition to Vacate or Modify Arbitration Award is **DENIED** and **DISMISSED** with prejudice. Further, Respondent's request for attorneys' fees and costs is **DENIED**.

BY THE COURT:

COHEN, GENE D., J.

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MEMORANDUM OPINION

COHEN, GENE D., J.

Before the Court are the preliminary objections of Respondent, Donald Manchel, Esquire (“Manchel”) to Petitioner, Marvin Lundy, Esquire’s (“Lundy”) Petition to Vacate or Modify Arbitration Award (“Petition to Vacate”).

The Petition to Vacate was filed with this Court after more than five years of an intense and acrimonious binding arbitration process to dissolve the parties’ law partnership. During the arbitration, numerous orders were issued by the Arbitrator, including most importantly, the orders of April 14, 2001 and September 7, 2001, both of which were confirmed on February 4, 2002, by Judge Carrafiello of this Court. On April 16, 2002, two months after this court certified the awards, Lundy petitioned the Arbitrator for Appropriate Adjustment Based on Inequity in Value (“Petition for Adjustment”). On May 8, 2002, after review of Lundy’s Petition for Adjustment, Manchel’s objections to the Petition for Adjustment, and

the arbitration awards, the Arbitrator denied Lundy's Petition for Adjustment (the "May 8th Order").

Subsequent to the May 8th Order, Lundy filed his Petition to Vacate before this Court. Lundy asserts that he was denied his right to a full and fair hearing because the Arbitrator denied his Petition for Adjustment without holding a new hearing on the arbitration awards, and before Lundy could reply to Manchel's Preliminary Objections to Lundy's Petition for Adjustment. Additionally, Lundy alleges that the May 8th Order was tainted by bias and fraud on the part of the Arbitrator, and that the May 8th Order was grossly inequitable. Manchel argues in the instant Preliminary Objection, that Lundy has brought this Petition to Vacate in an attempt to re-litigate settled matters which Lundy has previously contested on numerous occasions. Moreover, Manchel maintains that Lundy's Petition to Vacate is legally insufficient, procedurally deficient, and that the petition is vexatious and brought in bad faith, thus entitling Manchel to an award of attorneys' fees and costs under 42 Pa.C.S. § 2503.

Upon review of the pleadings and for the reasons set forth below, Respondent's Preliminary Objections are Overruled in part, and Sustained in part. Accordingly, this Court dismisses Lundy's Petition to Vacate or Modify the Arbitration Award with prejudice.

I. As to Manchel's Preliminary Objections to Lundy's Petition to Vacate or Modify the Arbitration Award:

1. The preliminary objection to Lundy's Petition to Vacate for failure to mention Judge Carrafiello and Judge Carrafiello's confirmation order is **Overruled**. The Respondent fails to cite any rule that would support this preliminary objection.
2. The preliminary objection to Lundy's Petition to Vacate for failure to support his Motion to

File Under Seal is **Overruled**. This objection is moot because the Petitioner has withdrawn his Motion to File Under Seal. Furthermore, the Respondent fails to cite any rule that would support this preliminary objection.

3. The preliminary objection to Lundy's Petition to Vacate due to this court's lack of jurisdiction is **Overruled**. Pennsylvania law defines subject matter jurisdiction as "the capacity to pronounce a judgment of the law on an issue brought before this court through due process of law." Bernhard v. Bernhard, 447 Pa. Super. 118, 124, 668 A.2d 546, 548 (1995)(citations omitted). With certain exceptions not applicable here, the Pennsylvania Courts of Common Pleas are courts of unlimited jurisdiction. 42 Pa.C.S. § 931. In the case of a petition to vacate an arbitration award, 42 Pa.C.S. § 7342 has been consistently interpreted to provide the Court of Common Pleas with jurisdiction to hear such an appeal. Lowther v. Roxborough Memorial Hospital, 738 A.2d 480, 485 (Pa. Super. Ct. 1999). Thus, it is clear that this court has jurisdiction to rule on the Petition to Vacate.

4. The preliminary objection to Lundy's Petition to Vacate based on the assertion that the court's confirmation of the arbitration awards is a pending prior action is **Overruled**. The Court's confirmation of the arbitration awards was required by law and is considered a final judgment. See Sage v. Greenspan, 765 A.2d 1139, reargument denied, appeal denied, 566 Pa. 684, 784 A.2d 119 (2000). A party seeking to vacate an arbitration award must file a petition to vacate the award within 30 days of the entry of the award. 42 Pa.C.S. § 7342. In the absence of a timely filed petition to vacate an arbitration award, statutory procedure requires a trial court to enter judgment confirming a binding arbitration award. Sage, 765 A.2d at 1143. Thus, the court's prior confirmation of the awards is a final judgment and cannot be considered a pending prior action under Pa. R. Civ. P. § 1028(a)(6).

5. The preliminary objection to Lundy’s Petition to Vacate due to an agreement for alternative dispute resolution is **Overruled**. 42 Pa.C.S. § 7342 has been consistently interpreted to provide the Court of Common Pleas with jurisdiction to hear appeals of arbitration awards, which by definition, are the subject of prior agreements for alternative dispute resolution. Lowther v. Roxborough Memorial Hospital, 738 A.2d 480, 485 (Pa. Super. Ct. 1999).

6. The preliminary objection to Lundy’s Petition to Vacate for legal insufficiency of the pleading is **Sustained**. For the purposes of reviewing preliminary objections asserting legal insufficiency, “all well-pleaded material, factual averments and all inferences fairly deducible therefrom” are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000). When presented with preliminary objections which if sustained, would result in a dismissal of an action, a court should sustain the objections only where “it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief.” Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. Ct. 2000)(citation omitted). Furthermore,

[I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999)(citations omitted).

Under Pennsylvania law, a court will sustain a claim to vacate a common law arbitration only under limited circumstances. It is well settled that arbitrators are the final judges of both law and fact, and that an arbitration award is not subject to reversal for mistake of either. Prudential Property and Cas. Ins. Co. v. Stein, 683 A.2d 683, 453 Pa. Super. 227 (1996). Pursuant to 42 Pa.C.S. § 7341, an arbitration

award can only be vacated if “it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.”

a. Petitioner fails to state a claim that he was denied a hearing

Here, the Petitioner’s sole claim is that he was denied a hearing because the Arbitrator denied his Petition for Adjustment without holding a new hearing to review the arbitration awards, and before Petitioner could reply to Respondent’s Preliminary Objections to the Petition for Adjustment.¹ Essentially, the Petitioner claims he did not have an opportunity to be heard because the Arbitrator denied his request to adjust an arbitration award before he could reply to Respondent’s objections to his own motion. The Petitioner cannot successfully claim that he was denied an opportunity to be heard when he presented arguments before the initial awards were granted, and later presented arguments to challenge those same awards in his own Petition for Adjustment.²

In Allstate v. Fioravanti, the Supreme Court of Pennsylvania rejected a similar claim that counsel was denied a fair hearing where an arbitration panel denied counsel the opportunity to present a memorandum on the controlling issue of law, when counsel had already presented that same issue during opening and closing arguments before the panel. Fioravanti, 451 Pa. 108 (1973). Similarly, Petitioner,

¹ Petitioner suggests that the language in Paragraph 13(D) of the parties’ Dissolution Agreement, entitles him to another hearing to determine the equity of the prior awards. The language cited by the Petitioner defines the issues which the Arbitrator shall “resolve at the Hearing.” Pet. to Vacate p.2-3. The Court does not read this language to require the Arbitrator to grant another hearing.

² It should be noted that on November 1, 2001, the Arbitrator denied an earlier request by the Petitioner to reconsider the September 7, 2001 award.

cannot as a matter of law, claim that he was denied a hearing when he had an opportunity to be heard throughout the five years of arbitration proceedings, and where his own Petition for Adjustment was considered in denying adjustment of the certified arbitration awards. The Petitioner's facts are aptly summarized by the Pennsylvania Supreme Court's statement in Fioravanti: "[a]t most one Form of argument was closed off by the arbitrators, The argument itself was not." Id. at 113.

b. Petitioner fails to state a claim that there was fraud, misconduct, or corruption

The Petitioner claims that the Arbitrator's failure to grant a hearing on the Petition for Adjustment, failure to vacate the award and hold a subsequent hearing, and failure to allow Petitioner to respond to Respondent's objections constitutes "bias, prejudice, misconduct, fraud, and corruption." Pet. to Vacate, p. 8. Additionally, regarding the issue of fraud, the petitioner alleges that a letter from the Arbitrator warning against ex parte communications suggests prejudice and fraud. Pet. to Vacate, p.14 n.3. Without anything more, these facts alone do not support a claim for the Petitioner's blanket allegations that there was "bias, prejudice, misconduct, fraud, and corruption" during the arbitration proceeding. Pennsylvania law provides that in order to impeach an arbitration award for fraud, the fraud must be actual and not constructive. Fioravanti, 451 Pa. 108, 115 (1973). It must be shown that there was collusion between the arbitrator and the benefitted party. Id. In fact, the claim that an arbitrator was partial, unfair, and knowingly made an improper decision, is insufficient to prove fraud absent evidence of collusion. Id., citing Hostetter v. City of Pittsburgh, 107 Pa. 419, 435-36 (1884)(emphasis added). Petitioner's facts, accepted as true, fail to specify any act of fraud or collusion between the Arbitrator and the Respondent. Therefore, the Petitioner's blanket allegation of "bias, prejudice, misconduct, fraud, and corruption" is legally insufficient to vacate the arbitration award.

c. **Petitioner fails to state a claim that arbitration award was rendered subject to an “irregularity”**

Petitioner also alleges that the “unconscionability” of the award itself, and the lack of a hearing constitute “irregularities” sufficient to support vacating the award. To support its claim, petitioner cites to Allstate v. Fioravanti, a case where the Supreme Court of Pennsylvania declined to find an “irregularity” sufficient to vacate the arbitration award. 451 Pa. 108 (1973). For the reasons stated above in paragraph 6(a), the facts alleged here are analogous to Fioravanti and are insufficient as a matter of law.³

In sum, assuming all the facts in the Petition to Vacate to be true, because the Petitioner fails to state that he was denied a hearing, or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable arbitration award, the Petition to Vacate fails for legal insufficiency.

7. The preliminary objection to Lundy’s Petition to Vacate for not pleading petitioner’s fraud claim with sufficient specificity is **Sustained**. To determine whether a pleading meets Pennsylvania’s specificity requirement set forth in Pennsylvania Rule of Civil Procedure 1019(a), a court must ascertain whether the allegations are “sufficiently specific so as to enable [a] defendant to prepare [its] defense. Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991)(citation omitted). An allegation of fraud must “explain the nature of the claim to the opposing party so as to permit the preparation of a defense” and be “sufficient to convince the court that the averments are not merely subterfuge.” Martin v.

³ Additionally, Petitioner’s reliance on McKenna v. Sosso, is misplaced. 745 A.2d 1 (Pa. Super. Ct. 1999). In McKenna, the Superior Court, considered whether the parties were given a fair hearing, and declined to find an “irregularity.” Assuming McKenna, is applicable for the purpose of considering whether the Petitioner had an opportunity to be heard, the facts alleged by the Petitioner, on their face, are insufficient to demonstrate Petitioner was not heard.

Lancaster Battery Co. Inc., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992). The blanket allegation that the Arbitrator's failure to grant a hearing on the Petition for Adjustment, failure to vacate the award and hold a subsequent hearing, and failure to allow Petitioner to respond to Respondent's objections constitutes fraud is a general statement and fails to identify any specific act of fraud. Likewise, the Petitioner's allegation that a letter from the Arbitrator warning against ex parte communications suggests prejudice and fraud is also insufficient on its face.

8. The preliminary objection to Lundy's Petition to Vacate for failure to include a verification constituting a failure of the pleading to conform to law is **Overruled**. Although the Petition to Vacate failed to include a verification, one was supplied to this Court in the Petitioner's Reply to Respondent's Preliminary Objections. Under Pa. R. Civ. P. 126, a court may disregard any error or defect of procedure which does not affect the substantial rights of the parties. Therefore, since the error was corrected, there is no harm to the parties.

9. The preliminary objection to Lundy's Petition to Vacate for failure to properly plead with paragraphs constituting a failure of the pleading to conform to law is **Overruled**. Although Lundy's Petition is procedurally deficient for failure to adhere to Pa. R. Civ. P. 1022, this Court will disregard this defect of procedure as it does not affect the substantial rights of the parties. Pa. R. Civ. P. 126.

10. The preliminary objection to Lundy's Petition to Vacate for inclusion of scandalous or impertinent matter is **Overruled**. This objection is moot since the Court is denying the Petition to Vacate in its entirety.

II. As to Manchel's Request for Attorneys' Fees and Costs:

For the reasons set forth below, Manchel's request for attorneys' fees and costs is denied. In his

preliminary objections, Respondent argues that he is entitled to attorneys' fees and costs because of the Petitioner's apparent disregard for the binding arbitration awards issued over one year ago, and the confirmation judgment of this Court issued in February 2002. Under 42 Pa.C.S. § 2503(9), a party is entitled to counsel fees if "the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith."⁴ Each of these terms have been narrowly defined as follows:

An opponent's conduct has been deemed to be "arbitrary" within the meaning of the statute if such conduct is based on random or convenient selection or choice rather than on reason or nature. An opponent also can be deemed to have brought suit "vexatiously" if he filed the suit without sufficient grounds in either law or in fact and if the suit served the sole purpose of causing annoyance. Finally, an opponent can be charged with filing a law suit in "bad faith" if he filed the suit for the purposes of fraud, dishonesty, or corruption.

Thunberg v. Strause, 545 Pa. 607, 615-616, 682 A.2d 295, 299-300 (1996)(citations omitted).

The Respondent contends that the Petitioner's filing is legally and procedurally insufficient, and that the Petition to Vacate illustrates the Petitioner's "contempt of, his Agreement, the binding Arbitration proceedings, the Order of this Court, and . . .the Arbitrator." Res'p Prel.Obj., p.10, ¶18. The Respondent has failed to cite to any case supporting his claim entitling him to attorneys' fees, citing only to the Pennsylvania Rules of Civil Procedure. Although the record clearly demonstrates that the Petitioner has employed all possible procedural strategies which, in effect, delay compliance with the Arbitration awards, that were ordered in 2001, the Court cannot conclude that the Petitioner's actions in filing the Petition to Vacate rise to the level of being vexatious. Therefore, this Court denies Respondent's request for

⁴ Section 2503(9) was drafted with the intent "to sanction those who knowingly raise, in bad faith, frivolous claims which have no reasonable possibility of success, for the purpose of harassing, obstructing or delaying the opposing party." In re Estate fo Liscio, 432 Pa. Super. 440, 446; 638 A.2d 1019, 1022 (1994), citing Dooley v. Rubin, 422 Pa. Super. 57, 64, 618 A.2d 1014, 1018 (1993).

attorneys' fees and costs.

CONCLUSION

For the above-stated reasons, this Court sustains the demurrer raised by Respondent and the Petition to Vacate the Arbitration Award is dismissed with prejudice. Furthermore, the Respondent's request for attorneys' fees and costs is denied.

BY THE COURT:

COHEN, GENE D., J.

DATED: August 21, 2002