

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

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|-------------------------------------|---|-----------------------|
| OMINSKY & MESSA, P.C., | : | January Term 2001 |
| Plaintiff, | : | |
| v. | : | No. 3846 |
| JOSEPH L. MESSA, JR., ANDREW D. | : | |
| SWAIN and MESSA & ASSOCIATES, P.C.: | : | (Commerce Program) |
| Defendant/Third-Party Plaintiffs, | : | |
| v. | : | |
| ALBERT OMINSKY, ESQUIRE and | : | |
| OMINSKY & OMINSKY, P.C., | : | Superior Court Docket |
| Third-Party Defendants. | : | No. 3160 EDA 2007 |

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OPINION

Albert W. Sheppard, Jr., J. May 13, 2008

This Opinion is submitted relative to appeal of Albert Ominsky and the firm of Ominsky & Ominsky, P.C. and Ominsky & Messa, P.C. (“Ominsky”) of this court’s Order of August 27, 2007, which denied Ominsky’s Petition to Vacate Arbitration Award. This Order was made a final Order on October 29, 2007, when this court confirmed the arbitrator awards at issue and entered judgments on them.

For the reasons briefly stated, this court submits that both Orders should be affirmed.

Background

This matter involves a bitter dispute between Ominsky and attorneys¹ who had been employed in the Ominsky firm but left to form a new firm. Ominsky sued Messa in January 2001.

Finally on May 23, 2006, the parties **agreed** to submit the matter to binding arbitration. The arbitration was to be conducted in two phases. In Phase I, the parties agreed: (1) to present evidence on the claims set forth in Ominsky's amended complaint and on the counterclaims of Messa, (2) that punitive damages were not to be awarded, and (c) on the form of admissible evidence. In Phase II, the Arbitrator would conduct hearings pertinent to the files in dispute. The files were identified in two lists, one prepared by Messa and one prepared by Ominsky.

On October 31, 2006, the Arbitrator issued the following award in Phase I:

1. In the matter of *Ominsky & Messa, P.C., Plaintiff vs. Joseph L. Messa, Jr., Andrew D. Swain and Messa & Associates, P.C.*, in favor of Defendants and against Plaintiff;
2. In the counterclaim of *Andrew D. Swain, Third-Party Plaintiff vs. Albert Ominsky, Esquire and Ominsky & Ominsky, P.C., Third Party Defendants*, in favor of Andrew D. Swain in the amount of \$37,500.00; and
3. In the counterclaim of *Joseph L. Messa, Jr., Third-Party Plaintiff vs. Albert Ominsky, Esquire and Ominsky & Ominsky, P.C., Third-Party Defendants*, in favor of Joseph L. Messa, Jr. in the amount of \$509,917.25.

On February 15, 2007 and on March 28, 2007, arbitration hearings for Phase II took place with respect to the first ten cases, involving attorney fees of \$6,529,543.40.

On April 27, 2007, the Arbitrator issued awards allocating fees on those ten cases between Ominsky and Messa.

¹ Primarily, Joseph L. Messa, Jr.

On May 29, 2007, Ominsky filed a Petition to Vacate the Award entered by the Arbitrator because of alleged misconduct and irregularities in the proceedings. On August 16, 2007, Ominsky filed an Amended Petition to Vacate the Award alleging that the entire arbitration process was flawed because the Arbitrator served as a mediator and arbitrator. On October 29th 2007, the court entered an Order denying the petitions and confirming the awards. Ominsky filed a timely appeal on November 26, 2007.

Discussion

The review of a common law arbitration award is narrowly circumscribed. It is acknowledged 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.² Pursuant to 42 Pa.C.S. § 7341, an arbitration award can be vacated only 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."³ Errors of the law or the failure of the arbitrators to render awards that have some relationship to the evidence that the parties introduced are not a basis for judicial intervention.

In this context, irregularity refers to the process employed in reaching the result of the arbitration, not the result itself.⁴ A cognizable irregularity may appear in the conduct of either the arbitrator or the parties.⁵ Our Supreme Court has stated that the phrase "other irregularity" in the process employed imports "such bad faith, ignorance of the law and indifference to the justice of the result" as would cause a court to vacate an

² Prudential Property and Cas. Ins. Co. v. Stein, 453 Pa. Super. 227, 683 A.2d 683 (1996).

³ 42 Pa.C.S. § 7341.

⁴ Gargano v. Teminix Int'l. Co. L.P., 784 A.2d 188, 193, (Pa. Super. 2001).

⁵ McKenna v. Sossso, 745 A.2d 1, 4 (Pa. Super. 1999).

arbitration award.⁶ Ominsky, as the petitioner "bears the burden to establish both the underlying irregularity and the resulting inequity by 'clear, precise and indubitable evidence.'"⁷

Ominsky argued that the process employed in reaching the arbitration award was patently irregular because the Arbitrator refused to look at the case files, rewarded Messa's spoliation of evidence, failed to disclose fees, refused to require Messa to provide an accounting of the litigation costs and served as mediator and arbitrator. According to Ominsky these irregularities caused an unjust, inequitable and unconscionable award. This court disagrees.

This court is not in a position to review the merits of the case or retry the issues addressed in arbitration. The evidence presented demonstrates the wrongness of Ominsky's claim. In the Arbitrator's awards dated April 27, 2007 which allocated the fees between Ominsky and Messa, the Arbitrator discussed the rationale behind his decision-making process and factors he took into consideration when allocating the fees. The rationale behind his decision making was **not** irregular or based on fraud. The Arbitrator weighed the evidence presented, assessed its credibility and allocated the fees accordingly. The fact that the Arbitrator allocated a certain percentage to Messa's origination fee goes to the merits of the claim not the process. Indeed, in some instances the arbitrator allocated more to Ominsky than Messa. In performing this function, the Arbitrator was free to believe all, part or none of the evidence. Here, the Arbitrator, after careful analysis, properly allocated the fees. The fact that Ominsky is disappointed with the allocations is not a basis to vacate the Awards.

⁶Allstate Ins. Co. v. Fioravanti, 451 Pa. 108, 299 A.2d 585, 589 (Pa. 1973).

⁷Gargano v. Teminix Int'l. Co. L.P., *supra*.

Ominsky's claim that the Arbitrator should be removed since he served as mediator and arbitrator must fail. Ominsky **agreed** to the procedures and has waived the right to raise this claim. Ominsky was aware at the time of the arbitration that the Arbitrator also served as the mediator. Important is the fact that Ominsky did not object to the Arbitrator at that time. Since Ominsky failed to raise any objection regarding the Arbitrator's ability to perform at the time of the arbitration, Ominsky cannot raise that objection now.

In sum, it must be stressed that Ominsky entered into a Stipulation with counsel selecting the very Arbitrator he now seeks to remove.

Conclusion

For the reasons discussed, this court's Orders should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.