

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

LANG TENDONS, INC.,	:	November Term, 2000
Plaintiff	:	
	:	No. 2695
v.	:	
	:	Commerce Case Program
AMERICAN SPRING WIRE CORP.,	:	
Defendant	:	Control No. 020819

MEMORANDUM OPINION

Petitioner Lang Tendons, Inc. (“Lang”) has filed a Motion for Reconsideration of Court’s Order Dated February 5, 2001 (“Motion”). The Court issued the Order after consideration of Lang’s Petition to Vacate Arbitration Award (“Petition”). While the memorandum opinion issued in conjunction with the Order (“Opinion”) outlines the Court’s reasons for denying the Petition, Lang now asserts that the Court made procedural errors in denying the Petition. This Memorandum Opinion responds to the arguments made in the Motion and provides the Court’s rationale for denying the Motion.

BACKGROUND

Essentially, this matter arises from Lang’s purchase of steel strand (“Strand”) from American Spring Wire Corp. (“ASW”) for use in constructing anchors (“Anchors”) for Ram Engineering and Construction Co. (“Ram”) in 1990 and 1991. These purchases were made pursuant to a series of sales contracts drafted by Lang (collectively, “Contract”). When Ram discovered that several of the Anchors were defective, it instituted litigation against Lang. Because Lang alleged that the Anchors’ defects arose from flaws in ASW’s manufacture of the Strand, it initiated an arbitration action against

ASW pursuant to the Contract's arbitration clause ("Arbitration"). ASW responded with a counterclaim based on Lang's failure to pay for the Strand.

Arbitrator Samuel H. Karsch ("Karsch") held evidentiary hearings on the Parties' claims pursuant to the American Arbitration Association ("AAA") Construction Industry Rules. Lang claims that Karsch improperly excluded evidence critical to its case and prevented Lang witnesses from testifying in violation of the AAA rule that a hearing should be closed when the arbitrator is "satisfied that the presentation of the parties is complete." AAA Construction Industry Rule R-35.

When Karsch issued an award that denied each Party's claim against the other ("Award"), Lang filed the Petition, which asserted that the portion of the Award denying Lang's claim was defective and must be vacated. Lang submitted neither a copy of a transcript of the Arbitration ("Transcript") nor any formal documents written by Karsch, aside from the Award and an order setting forth a schedule for the Arbitration. In addition, Lang made no request for discovery or oral argument in the Petition.

After evaluating the Petition, the Court concluded that Lang's failure to supply a copy of the Transcript or documents evidencing Karsch's reasoning behind his decisions rendered it impossible to evaluate any claims of impropriety:

When a party petitioning to vacate an arbitration award presents inadequate evidence to support its argument, a court may not grant the party's petition. In Carroll v. State Farm Mutual Automobile Insurance Co., 420 Pa. Super. 215, 616 A.2d 660 (1992), for example, the petitioning party did not present a transcript of the arbitration hearing, and the opposing party admitted no wrongdoing. This led the Superior Court to the following conclusion:

As is evident from the preceding, the account of the plaintiff is presented in her brief, a factor which undermines our ability to place any credence

in that which is asserted therein. Even if such were not the case, the plaintiff fails in her effort to inform the Court of the basis for the arbitrators' award. In fact, she recommends that we "imply" from the award issued the underlying rationale for the arbitrators' actions. This is not consistent with either law or logic.

420 Pa. Super. at 226-27, 616 A.2d at 666 (citations omitted). See also Weinmann v. Meehan, 428 Pa. Super. 582, 586, 631 A.2d 684, 686 (1993) (where the party seeking vacation did not present a transcript of the arbitration hearing, there was no evidence that the party had raised an objection at the hearing, thus precluding consideration of the objection); Whitt v. Philadelphia Hous. Auth., 325 Pa. Super. 135, 144, 472 A.2d 684, 689 (1984) ("[a] reviewing court may not second-guess a fact-finder, where, as here, there is no transcript of the testimony and the reviewing court thus has no means by which to weigh the sufficiency of the evidence or to change the factual findings made therefrom").

In the instant matter, Lang has presented no evidence whatsoever to convince the Court that Karsch's actions rise to the level of misconduct required by Section 7341. While Lang's documents address the propriety of Karsch's decisions, they rely entirely on argument and conclusory statements. No portion of any transcript has been submitted, and the only documents not authored by Lang or its counsel are the AAA Rules and three one-page notices from Karsch. Without additional evidence, the Court cannot find that the requirements of Section 7341 have been met and must deny the Petition.

Opinion at 4-5. On this basis, the Court denied the Petition and entered judgment based on the Award.

Nine days after the Order was issued, Lang filed its Motion for Reconsideration. No portions of the Transcript are attached to the Motion, and Lang's memorandum of law ("Lang's Memorandum") is almost identical to the one submitted in connection with the Petition.¹

DISCUSSION

Lang contends that the Court erred in four ways in denying the Petition:

¹ Lang's Memorandum almost exclusively addresses why the Award, not the Order, should be vacated and revisits the actions taken by Karsch at the Arbitration. There is no discussion of any of the arguments raised by Lang in the Motion.

1. Lang was entitled to take discovery;
2. Lang was entitled to oral argument;
3. ASW's answer to the Petition was unsigned and unverified; and
4. The Court improperly decided the Petition as an ordinary motion, not a petition.²

These arguments are unpersuasive, and the Motion must be denied.

I. Because the Petition Did Not Raise Any Disputed Issues of Material Facts, Discovery Was Not Warranted

When reviewing an appeal from an arbitration award, a trial court effectively is functioning as an appellate court. See, e.g., City of Pittsburgh v. Kissner, 746 A.2d 661, 666 (Pa. Commw. Ct. 2000) (in reviewing an appeal from an agency arbitration, a trial court is acting in an “appellate role”); McKenna v. Sosso, 745 A.2d 1, 4 (Pa. Super. Ct. 1999) (“[n]either [the Superior Court] nor the trial court may retry the issues addressed in arbitration or review the tribunal’s disposition of the merits of the case”). A party seeking to vacate a common law arbitration award bears the heavy burden of establishing “both the underlying irregularity of the arbitration proceedings and the resulting inequity of the award by clear, precise and indubitable evidence.” McKenna, 745 A.2d at 4 (citations and quotation marks omitted).

² Lang makes a fifth argument that the Order acknowledges that additional evidence could require modification of the conclusions reached in the Opinion. This, however, is more of a factual allegation in support of Lang’s first argument than an independent fifth argument and will be treated accordingly.

Under Philadelphia Rule *206.1(E),³ a court must determine disputed issues of fact raised by petitions for vacation of arbitration awards in accordance Rule 206.7(c).⁴ Rule 206.7(c), in turn, states that, “[i]f an answer is filed raising disputed issues of material fact, the petitioner may take depositions on those issues, or such other discovery as the court allows, within the time set forth in the order of the court.” Lang argues that the Petition and ASW’s answer thereto raised disputed issues of material fact that were required to be determined by discovery. In addition, Lang argues that MGA Insurance Co. v. Bakos, 699 A.2d 751 (Pa. Super. Ct. 1997) requires the Court to allow discovery.

Lang’s reliance on MGA is inapposite. There, the trial court mistakenly treated the underlying arbitration as a common law arbitration, from which appeal is permitted only under extremely limited circumstances. Accordingly, the Superior Court remanded the case for consideration as a statutory arbitration award. In dicta, the Superior Court directed the trial court’s attention to Rule 206.7 but refrained from concluding that there were any disputed issues of material fact. See 699 A.2d at 754 (“[b]ecause no determination has yet been made in the trial court as to whether disputed issues of material fact exist relevant to the statutory arbitration issue raised by appellant, we will not make such a determination in this appeal”). Because the Superior Court did nothing more than remind the trial court of the process for resolving factual disputes when they arise, MGA does not require the Court to allow discovery here.

Moreover, the Petition presents no disputed issue of material facts. Lang has not presented a copy of the Transcript, making it impossible for Lang to satisfy its burden for vacation or for the Court

³ Each Philadelphia Civil Rule is referred to individually as a “Philadelphia Rule.”

⁴ Each Pennsylvania Rule of Civil Procedure is referred to individually as a “Rule.”

to fulfill its appellate role of reviewing the Award in any substantive manner. To undertake a review without a record would be akin to an appeals court attempting to reconstruct the substance of the underlying proceedings through nothing but the testimony of bystanders and onlookers, at best, and interested parties, at worst.⁵ This would be both improper and unmanageable. Consequently, any facts in dispute are not material, as Lang's allegations, even if true, do not satisfy its burden and do not allow the Court to vacate the Award without the Transcript.

Lang quotes the portion of the Opinion which states that, "[w]ithout additional evidence, the Court cannot find that the requirements of Section 7341 have been met and must deny the Petition." Opinion at 5. The Court stands by its earlier statement, but disagrees with Lang's interpretation of it. As can be seen in the portion of the Opinion quoted at length supra, the obstacle to a decision in Lang's favor was not a lack of evidence in general but rather the absence of a record of the Arbitration proceedings and any substantive documents not drafted by Lang or its attorneys. Because the Motion

⁵ Under Pennsylvania Rule of Appellate Procedure 1911(a), an appellant bears the responsibility for ensuring that a complete record is provided for review purposes. See also Spino v. John S. Tilley Ladder Co., 448 Pa. Super. 327, 354, 671 A.2d 726, 740 (1996), aff'd, 548 Pa. 286, 696 A.2d 1169 (1997) ("[t]he responsibility for providing a complete record for purpose of review on appeal is borne by the appellant"). A number of Pennsylvania cases make it clear that an appellant's failure to comply with this requirement is grounds for dismissing the appeal. See, e.g., Smith v. Smith, 431 Pa. Super. 588, 592, 637 A.2d 622, 623-24 (1993) ("a failure by an Appellant to insure that the original record certified for appeal contains sufficient information to conduct a proper review constitutes a waiver of the issue(s) sought to be examined"). Analogizing to the instant case, it is appropriate to hold the party appealing an arbitration award, here, Lang, responsible for providing the record of the underlying hearing, including those errors complained of on appeal. Cf. Vacca v. Matteo, 321, Pa. Super. 482, 484, 468 A.2d 812, 813 (1983) (absence of transcript of trial court hearing prevented the Superior Court from addressing issues on appeal).

fails to remedy any of these defects, Lang has not provided any reason to allow discovery, and the Court's position as stated in the Opinion remains unchanged.

In sum, Lang, as the appealing party, bears the burden of providing evidence of arbitrator error. Without the Transcript, no facts it alleges allow the Court, acting in its appellate function, to vacate the Award. Thus, no disputed issues of material facts exist to warrant discovery, and the Order was proper.

II. Lang Never Requested Oral Argument on the Petition, Removing Any Obligation on the Part of the Court to Hold Oral Argument

Pennsylvania Rule of Civil Procedure 211 ("Rule 211") grants any party the right to oral argument on any motion. There is no requirement in Rule 211, however, that a court grant oral argument on a motion in the absence of a request by one of the parties. Godlewski v. Pars Mfg. Co., 408 Pa. Super. 425, 429, 597 A.2d 106, 108 (1991).⁶

Nowhere in the Petition or any of the supporting documents did Lang request oral argument on the Petition. Because no such request was made, the Court had no obligation to hold oral argument on the Petition, and there has been no violation of Rule 211.

⁶ In Godlewski, the Pennsylvania Superior Court considered the impact of Rule 211 and Luzerne County Local Rule 270(d) ("Rule 270(d)"), which dictated that the party seeking oral argument on a motion must request oral argument. The court concluded that the request requirement in Rule 270(d) was legitimate and that the appellant's failure to request oral argument rendered the trial court's failure to hold argument valid.

If Rule 211 mandated that a trial court grant oral argument on a motion automatically, as Lang appears to contend, this state rule requirement would have superseded Rule 270(d) in accordance with Pennsylvania Rule of Civil Procedure 239(b)(1), and the trial court's action would have been improper. Because the Superior Court did not come to this conclusion, it can be inferred that Rule 211 alone does not require oral argument on a motion in the absence of a request from one of the parties.

III. Alleged Defects in ASW's Answer to the Petition Do Not Require Vacating the Order

Lang contends that ASW's answer was not verified, requiring that the Order be vacated. Even if Lang's assertion is correct, it does not require vacating the Order.

Rule 206.3 directs that "[a] petition or an answer containing an allegation of fact which does not appear of record shall be verified." Lang correctly cites Rupel v. Bluestein, 280 Pa. Super. 65, 421 A.2d 406 (1980), for the principle that "[i]mproper verification of a complaint may not be brushed aside as a mere legal technicality. . . ." 280 Pa. Super. at 75, 421 A.2d at 411 (citations and quotation marks omitted).⁷ Lang, however, fails to quote the balance of the paragraph from which it has excised this quotation:

On the other hand, we must also be cognizant of the admonition in Pa.R.Civ.P. R. 126 that the rules of civil procedure shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties. Courts should not be astute in enforcing technicalities to defeat apparently meritorious claims. The procedural rules are not ends in themselves, but means whereby justice, as expressed in legal principles, is administered; they are not to be exalted to the status of substantive objectives.

280 Pa. Super. at 76, 421 A.2d at 411 (citations and quotation marks omitted). See also Monroe Contract Corp. v. Harrison Sq., Inc., 266 Pa. Super. 549, 557, 405 A.2d 954, 958 (1979) (striking a petition due to improper verification "would be contrary to both the design of verification and our numerous holdings in other areas viewing substantial compliance as a sufficient standard. Verification . .

⁷ Rupel was decided under Rule 1024, which addresses verification of pleadings. Because the language in Rule 206.3 tracks that in Rule 1024, however, cases interpreting Rule 1024 are, at the least, persuasive.

. must not be transformed into an offensive weapon designed to strike down an otherwise valid petition”).

Here, granting the Motion solely because ASW’s answer to the Petition was unverified would be highly inappropriate: even if the assertions made in the Petition are considered in isolation, they do not provide a basis for vacating the Award. Accordingly, whether ASW’s answer was verified or not is irrelevant for the purposes of the Motion.

IV. The Manner in Which the Court Decided the Petition Was Proper

Lang generally asserts that “an action commenced by Petition should proceed like any other action commenced by complaint. In other words, a petitioner is entitled to discovery and a trial on the merits.” Motion at ¶ 27.⁸ This is not entirely correct. Actions commenced by petition are treated in accordance with Rules 206.1 through 206.7. Rule 206.4(a) states that a decision to issue a rule to show cause on a petition is within the discretion of court “unless the court by local rule adopts the procedure of Rule 206.6 providing for issuance as of course.” Philadelphia County has not adopted Rule 206.6 but rather has directed in Philadelphia Rule *206.1 that courts determine petitions raising issues of fact in accordance with Rule 206.7(c). As discussed supra, the Petition raised no disputed issues of material fact, and the Court therefore had no obligation to allow discovery of any kind. Thus, the Motion raises no defects in the procedure used by the Court in evaluating the Petition.

⁸ The Petition fails to provide specific complaints about the Court’s procedural handling of the Petition and offers nothing more than the broad assertion that the Court improperly decided the Petition as a motion without allowing discovery. In addition, nowhere in its Memorandum does Lang address the exact procedural deficiencies it alleges in the Petition. As a result, it is difficult to determine the precise nature of Lang’s complaint.

CONCLUSION

Because the Petition did not raise any disputed issues of material fact or request oral argument, the Court properly denied the Petition without ordering discovery or holding oral argument. In addition, the alleged defects in ASW's answer to the Petition do not provide a basis for granting the Petition. Accordingly, the Motion is denied.

BY THE COURT:

JOHN W. HERRON, J.

Dated: March 6, 2001

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Plaintiff	:	
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v.	:	
	:	Commerce Case Program
AMERICAN SPRING WIRE CORP.,	:	
Defendant	:	Control No. 020819

ORDER

AND NOW, this 6th day of March, 2001, upon consideration of Petitioner Lang Tendons, Inc.'s Motion for Reconsideration of the Court's Order Dated February 5, 2001, and in accordance with the Opinion being filed contemporaneously with this Order, it is ORDERED and DECREED that the Motion is DENIED.

BY THE COURT:

JOHN W. HERRON, J.