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OF THE COMMITTEE ON OPINIONS

ELAINE PLAUT, BRADFORD LIVA, THE BRADFORD LIVA CHILDREN'S TRUST, EDWARD LIVA III, ALEXANDRA LIVA, JUSTIN LIVA and BRADFORD LIVA, JR.,

Plaintiffs,

v.

EYE INSTITUTE OF PARAMUS, LLC, BERGEN MANAGEMENT, LLC, JEFFREY LIVA, DOUGLAS LIVA, EDWARD L. LIVA, JR., THE EDWARD LIVA L. LIVA, JR. CHILDREN'S TRUST, CRISTINA LIVA, JONATHAN LIVA, and CHRISTOPHER LIVA

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET No. C-292-18

OPINION

Argued: November 30, 2018

Decided: January 3, 2019

Appearances: John L. Van Horne III, (Reeve & Van Horne, Esqs., attorneys) for plaintiff

Richard A. Joel, (Joel & Joel, LLP, attorneys) for defendants

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HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the Court upon application of Reeve & Van Horne, attorneys for Plaintiffs, Elaine Plaut, Bradford Liva, The Bradford Liva Children's Trust, Alexandra Liva, Justin Liva, and Bradford Liva Jr., as well as Edward Liva III, appearing *pro se*, for an Order to modify and correct the decision and final award of Arbitrator Hon. John E. Keefe, J.A.D. (ret.) and to confirm said award, filed on October 23, 2018. Defendants, Eye Institute of Paramus, LLC, Bergen Management, LLC, Jeffrey Liva, Douglas Liva, Edward Liva Jr. Children's Trust, Cristina Liva, Jonathan Liva, and Christopher Liva, by and through counsel Joel & Joel, LLP, filed opposition to Plaintiffs' Order to Show Cause, as well as a cross-motion seeking to dismiss the matter on

November 15, 2018. Plaintiffs filed a reply brief on November 26, 2018. The Court heard oral argument on November 30, 2018.

LEGAL STANDARD

Arbitration can attain the goal of providing "final, speedy and inexpensive settlement of disputes only if judicial interference with the process is minimized." Barcon Assocs. v. Tri-Cnty. Asphalt Corp., 86 N.J. 179, 187 (1981). Accordingly, arbitration is meant to be "a substitute" for litigation, and not a "springboard" to it. See id. (internal citations omitted). A court may vacate an arbitration award only if it is "wholly bereft of evidential support." McHue Inc. v. Soldo Const. Co., 238 N.J. Super 141, 147-48 (App. Div. 1990).

The Arbitration Act was designed to grant arbitrators extremely broad power and "extends judicial support to the arbitration process subject only to limited review." Barcon Assocs., 86 N.J. at 187 (1981). As a result, arbitration awards are generally presumed valid. See Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super 503 (App. Div. 2004).

As a matter of public policy, it is well settled that "every intendment is indulged in favor of an arbitration award and that it is subject to impeachment only in a *clear* case." Barcon, 86 N.J. at 187 (internal citations omitted) (emphasis added). Courts will not overturn an arbitrator's determination of a legal issue so long as the determination was "reasonably debatable." See Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 489, 492-93 (1991). In short, the Court is obligated to summarily uphold the award if the Arbitrator offers even a barely colorable justification for the outcome, and will not set aside an award "merely because the court would have decided the facts or construed the law differently." Carpenter v. Bloomer, 54 N.J. Super. 157, 168 (A.D. 1959).

N.J.S.A. 2A:23B-23 provides the grounds for vacating an arbitration award under the New Jersey Uniform Arbitration Act. The statute provides that, upon the filing of a summary action with

the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

> (1) the award was procured by corruption, *fraud*, or other *undue means*; (2) the court finds evident partiality by an arbitrator, corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, *refused to consider evidence material to the controversy*, or otherwise conducted the hearing contrary to second 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator's powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c of section 15 of this act not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding. (emphasis added).

ANALYSIS

The parties arbitrated before the Hon. John E. Keefe, J.A.D. (ret.) between March 22, 2018 and April 4, 2018. Judge Keefe issued his Final Decision and Award on August 16, 2018.

Plaintiff argues in support of its own order to show cause seeking confirmation of the arbitration award, as well as in opposition to Defendants' cross-motion to dismiss and to vacate said award, that Defendants lack any statutory basis to support a factual and merits based review of Judge Keefe's Final Award. Essentially, Plaintiffs argue that Defendants are seeking to relitigate issues already considered by Judge Keefe that are reflected in his Final Award, and are merely pursuing a proverbial second bite at the apple.

Specifically, Defendants desire to vacate Judge Keefe's award is rooted in subsections (1) and (3) of N.J.S.A. 2A:23B-23. Defendants contend that because Judge Keefe allegedly failed to consider, or in the alternative refused to consider, that court proceedings in Florida and New Jersey found that Elaine and Bradford were not the executors of the Estate of Edward Liva Sr., the final award must have either been procured as a result of fraud or undue means by the Plaut Group.

As an initial matter, the Court vehemently disagrees with Defendants' assertion that subsection (3) of N.J.S.A. 2A:23B-23 is even remotely applicable to the case at bar. Not only are Defendants' moving papers completely void of any evidence supporting their blanket assertion that Judge Keefe "refused to consider evidence material to the controversy so as to substantially prejudice the rights of a party to the arbitration proceeding," but the argument itself is inaccurate as well.

In fact, Judge Keefe explicitly addressed the issue regarding the executors in his comprehensive, thirty-page decision. On Page 8 of the decision, Judge Keefe wrote:

> The Florida probate proceedings resulted in the entry of an Order by a judge other than the judge who issued the 2006 Order. The Order entered was titled "Supplemental Judgment of Summary Administration." The only relief sought and ordered by the Court was an order to distribute Ed Sr.'s interest in the EIOP in accord with the Will. Prior to that proceeding, Elaine took possession of the decedent's home, the lake property was sold, a tax identification number was obtained for the purpose of filing the estate return, and a compromise was effected with the IRS regarding how Edward Liva Jr.'s obligations to the estate were to be treated. Interestingly, despite the position taken by Doug and Jeff that the Florida Court had jurisdiction over the entire estate, the application filed in the Florida Court did not seek to invalidate the conduct of Elaine or Brad with respect to any prior actions in which they participated as representatives of the estate. Further, Doug and Jeff did not seek to have Letters testamentary issued to them, despite the alleged wrongful conduct of Elaine and Brad. Clearly, the sole purpose of the Florida proceeding was so Jeff and Brad could regain control of EIOP management.
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> Arbitrator's August 16, 2018 Decision and Final Award, at p. 8.

Judge Keefe expanded even further regarding Elaine's executor status in a manner that is, again, entirely inconsistent with Defendants' argument that he failed to consider evidence material to the controversy. Judge Keefe, on page 9 of the decision, stated:

> There has been no Order by Judge Contillo, or any other Court with jurisdiction over the parties, that the acts undertaken by Elaine as a *de facto* Executor of the Estate were void *ab initio*, or that she acted in bad faith. Nor was there a finding that the claim before the Court was without merit. The Order simply recognized Doug's authority to dismiss the suit in his capacity as Managing Member "without prejudice." I have read the transcript of the February 5, 2016 proceeding before Judge

> Contillo. Unfortunately, the attorneys for the parties elected for some unknown reason, not to include all of the judge's findings in the Order, so it is not clear to me whether the Court intended anything other than what the signed Order addresses. *Nonetheless, it is clear that Judge Contillo left open the issue of Elaine's good faith for another day, which I have now addressed and find in her favor*. (emphasis added).
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> Id. p. 9.

Judge Keefe concluded his opinion on page 28 by again specifically addressing Defense counsel's exact argument that he attempts to make now before this court:

> Lastly, Mr. Joel argues that I ignored the Florida Court Order of September 28, 2015, and, by implication, Judge Contillo's Order. I believe a fair reading of my opinion must conclude that I did neither. I recognized that Judge Contillo properly gave the Florida Court full faith and credit, and believe that I accurately interpreted what Judge Contillo considered to be open issues to be decided. The discussion in the opinion was for the purpose of determining Elaine's good faith in proceeding as she did, not whether the Florida Court was right or wrong.
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> Id. at p. 28.

A disagreement with the arbitrator's findings of fact are not grounds for vacating an award. Here, the Court finds that Judge Keefe did in fact consider the exact evidence Defendants are alleging he refused to consider, and unambiguously made findings regarding said evidence in his written opinion. Specifically, Defendants argue that Judge Keefe failed to consider the alleged fraudulent behavior of the individuals he deemed to be de factor executors of the estate. It is clear to the Court that Judge Keefe did in fact consider this evidence, and made adequate factual and legal determinations to support his decision, which are explicitly reflected in the verbiage of his opinion. Thus, subsection (3) of N.J.S.A. 2A:23B-23 is inapplicable to the matter before the Court and Defendants request to vacate the arbitration award on grounds that the Arbitrator refused to consider evidence material to the controversy is without merit.

Defendant similarly argues that the arbitration award should be vacated in accordance with subsection (1) of N.J.S.A. 2A:23B-23 because of the purported fraud and undue means exerted by

Elaine and Bradford discussed in detail above. Defendant concedes that Judge Keefe found that Elaine was a *de facto* Executor and acted in good faith, yet takes issue with this finding, and argues that the arbitration award should be vacated accordingly.

As noted above, the role of this Court in reviewing an arbitration award is not akin to acting as an appellate court on every factual and legal finding made by the arbitrator that the losing party disagrees with. To the contrary, the relevant case law will not allow this Court to overturn an arbitrator's determination of a legal issue so long as the determination was "reasonably debatable." See Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 489, 492-93 (1991). This Court is obligated to summarily uphold the award if the Arbitrator offers even a barely colorable justification for the outcome, and will not set aside an award "merely because the court would have decided the facts or construed the law differently." Carpenter v. Bloomer, 54 N.J. Super. 157, 168 (A.D. 1959).

Here, the Court finds that Judge Keefe's determination of the parties actions in regards to the estate were, at a minimum, "reasonably debatable" and therefore not suitable for this Court to overturn. As noted above, Judge Keefe – an experienced and respected former Presiding Chancery Judge and Appellate Division Judge – analyzed the merits of the respective actual and legal arguments before him and clearly demonstrated his findings in a carefully crafted and detailed thirty-page decision. It is clear to the Court that the Arbitrator offered not a "barely colorable justification for the outcome," such that setting aside the award would be inappropriate, but rather a methodical and thorough justification for each of his findings, particularly regarding the purported fraud of Elaine and Bradford. Specifically, Judge Keefe found that Elaine acted "in good faith" and struck down the very argument that Defendants are now attempting to relitigate. Thus, subsection (1) of N.J.S.A. 2A:23B-23 is inapplicable to the matter before the Court and Defendants request to vacate the arbitration award on grounds of fraud and undue means is without merit.

PLAINTIFF'S REQUEST FOR MODIFICATION

In addition to their application to confirm Judge Keefe's Final Arbitration Award, Plaintiffs make an application to the Court to modify one aspect of the award pertaining to Judge Keefe's award for $26,743.83 to be payable to Brad Jr., Justin and Alexandra. Plaintiffs' argue this amount should be awarded to each beneficiary individually, rather than cumulatively.

The exact language of the award on page 29 states: "Payable to Brad Jr., Justin, and Alexandra: $26,743.83 (one-third each) re: SRVSC charged to Doug." Arbitrator's August 16, 2018 Decision and Final Award, at p. 29. The sum of $26,743.83 represents just a single 3.3% interest of the total of the rent arrears wrongfully forgiven by Doug, but the Award provides that the single interest be divided by three, which is the number of beneficiaries. Plaintiffs argue that this was a mistake that resulted in each of the three beneficiaries of the BLCT receiving just 1.1% of the amount wrongfully forgiven, instead of the 3.3% amount as intended. Upon application to clarify and correct, Judge Keefe held that Plaintiffs' application was more than twenty days from the date of his underlying decision.

N.J.S.A. 2A:24-9 and 2A:24-7 provide that a Court may correct or modify an arbitration award if there was an "evident miscalculation of figures or an evident mistake in the description of a person, thing or property referenced to therein."

Here, the Court finds the clear meaning of Judge Keefe's opinion to award $26,743.83 *each* to Brad Jr., Justin, and Alexandra, representative of their 3.3% ownership interests. The total interest of the three beneficiaries just under ten percent. Ten percent of the $800,714.11 is $80,071.41. If that figure is divided by three, as would be the next step in determining each beneficiaries respective interest, the calculation comes to $26,690.47, which is just slightly less than the $26,743.83 amount awarded, with the difference clearly attributable to the method of calculation utilized.

Further, Judge Keefe awarded 3.75% of the improper $800,714.11 rent arrears to Edward Liva III, which came out to $30,026.77 based on his 3.75% ownership interest in Eye Institute of Paramus. There, Edward Liva III's $30,026.77 award is easily traceable because this amount is exactly 3.75% of $800,714.11. Thus, using this logic, the $26,743.83 number clearly represents a 3.3% of the $800,714.11. Because the three beneficiaries Brad Jr., Justin, and Alexandra each held a 3.3% ownership interest, that the $26,743.83 award – a number that represents 3.3% of $800,714.11 – was meant to represent the amount *each* were entitled to, not the *sum* of the total the three were entitled to.

This finding is further supported by Judge Keefe's explanation on Page 27, in which he states "[t]he percentage for the three children beneficiaries of the BLCT is 10%, not 12.99%. The error is plainly pointed out by adding 3.3% for each of the three beneficiaries: 3.3% being the closest acceptable division of 10 by 3." Id. at p. 27. Thus, it is clear that Judge Keefe found each beneficiary to receive 3.3% of the $800,714.11 award, not 1.1% that the one-third amount of $26,743.83 represents. This correction is well within the discretion of this Court because it does not even amount to a mathematical miscalculation, but rather a clarification on Judge Keefe's particular choice of language. At the very least, the wording at issue constitutes an "evident mistake in the description of a thing" that N.J.S.A. 2A:24-9 and 2A:24-7 gives this Court discretion to clarify and correct. This mathematical mistake as to the three beneficiaries' respective interest in the wrongfully forgiven rent is now corrected in accordance with the rules to provide each beneficiary with a $26,743.83 award.

CONCLUSION

Therefore, the Court is inclined to confirm Judge Keefe's August 16, 2018 Final Decision and Award, with the sole adjustment to be made to the $26,743.83 distribution to each of Brad Jr.,

Justin and Alexandra. Plaintiff's application to confirm the Award, as corrected by the Court, is hereby granted. An Order accompanies this decision.