SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2406-20

R.M.R. ELEVATOR COMPANY, INC.,

Plaintiff-Respondent,

v.

BROAD ATLANTIC ASSOCIATES, LLC,

Defendant-Appellant.

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Argued May 12, 2022 – Decided June 6, 2022

Before Judges Mitterhoff and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3596-20.

Andrew J. Soven (Holland & Knight LLP) argued the cause for appellant.

Robert T. Lawless argued the cause for respondent (Hedinger & Lawless LLC, attorneys; Robert T. Lawless on the brief).

PER CURIAM

Defendant Broad Atlantic Associates LLC appeals from a March 25, 2021 order confirming an October 22, 2020 arbitration award in favor of plaintiff R.M.R. Elevator Company and awarding attorney's fees to plaintiff. We affirm.

We discern the following facts from the record. In 2016, the parties entered into three contracts for the repair and upgrade of elevators at defendant's Newark offices. Paragraph twenty of each contract required binding arbitration of all claims in accordance with the Construction Industry Arbitration Rules. Paragraph fifteen of each contract stated in pertinent part, "[i]f collection action is required, the [c]ustomer will pay . . . attorneys' fees."

On February 27, 2019, plaintiff filed a demand for arbitration with the American Arbitration Association (AAA) alleging defendant owed approximately $50,000 for work performed under the three contracts. On March 22, 2019, defendant filed an answer and counterclaim alleging that plaintiff owed defendant damages in excess of $150,000.

Although the AAA appointed Andrew J. Carlowicz, Jr., as the arbitrator in May 2019, the hearings did not start until February 10, 2020. During hearings conducted on February 10, 2020, and February 11, 2020, plaintiff presented the entirety of its case, and defendant presented its first two witnesses. Although the hearings were scheduled to resume on March 19, 2020, the arbitrator granted

defendant's request for an adjournment due to the COVID-19 pandemic. In his March 12, 2020 email granting defendant's request, the arbitrator suggested conducting the hearings by video conference but made it clear that they would not "proceed with the video conference idea unless both sides agree." During a conference call plaintiff consented to a Zoom hearing and defense counsel indicated he had no problem proceeding remotely. The arbitrator gave defense counsel one week to secure his client's consent.

On March 31, 2020, the arbitrator ordered that the hearings would proceed via Zoom absent a "compelling reason." Afterwards, defendant requested a series of adjournments, including a request to adjourn the hearings until the stay-at-home order was lifted, due in part to defendant's objection to continuing the hearings via Zoom. On May 16, 2020, the arbitrator ordered that the hearings would continue on May 21, 2020[1] via Zoom.

On May 21, 2020, defendant's expert testified via Zoom. For the final hearing, the arbitrator permitted defendant to choose between July 28, 2020, or August 24, 2020, and to choose if the hearing would proceed remotely or in person with social distancing and masks. Defendant, who still objected to

[1] Plaintiff explains the date for the hearing in the arbitrator's order is a typographical error, and the hearing was scheduled for May 21, 2020, not May 28, 2020.

remote hearings, rejected both options. On July 20, 2020, the arbitrator stated that defendant cannot be unwilling to proceed with an in-person hearing while also adamantly opposing a remote hearing and thus refused to adjourn both the July 28, 2020, and August 24, 2020, date. The following day, defendant opted to adjourn the hearing date of July 28, 2020.

Defendant's last two witnesses testified on August 24, 2020, with defendant finishing its case on September 3, 2020. Both hearings took place on Zoom. In its post-hearing brief, defendant abandoned some of its counterclaims, reducing its claim to roughly $55,000.

On October 22, 2020, the arbitrator awarded plaintiff $28,542.65 for work performed under the contracts, $16,559.68 in interest, and $38,289 in attorney's fees, totaling $83,391.33. The arbitration fees and compensation brought the award up to $99,566.33. The arbitrator denied defendant's counterclaim in its entirety.

On October 30, 2020, plaintiff moved to confirm the arbitration award. On December 10, 2020, defendant filed an opposition and a motion to vacate the arbitration award. On December 29, 2020, plaintiff cross-moved for attorney's fees for the current litigation, which was opposed by defendant.

On March 25, 2021, after hearing from the parties, the judge confirmed the arbitration award, issued a judgment against defendant for $99,566.33 plus interest, and awarded plaintiff attorney's fees. On April 26, 2021, upon receiving plaintiff's affidavit of services, the judge amended the award to include attorney's fees, bringing the judgment against defendant up to $109,388.88. This appeal followed.

On appeal, defendant presents the following arguments for our consideration:

> POINT I
>
> THE ARBITRATOR UNREASONABLY DENIED [DEFENDANT]'S REQUESTS TO POSTPONE THE PROCEEDING
>
> POINT II
>
> THE SUPERIOR COURT ERRED IN GRANTING PLAINTIFF'S CROSS-MOTION FOR FEES

We review "the denial of a motion to vacate an arbitration award de novo." Manger v. Manger, 417 N.J. Super. 370, 376 (App. Div. 2010). "[A]rbitration awards are given a wide berth, with limited bases for a court's interference." Borough of E. Rutherford v. E. Rutherford PBA Loc. 275, 213 N.J. 190, 201 (2013). Therefore, "the party seeking to vacate [an award] bears a heavy

burden." Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 510 (App. Div. 2004).

N.J.S.A. 2A:23B-23(a) provides, in pertinent part, that the judge may vacate an arbitration award where:

> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section [fifteen] 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;

Pursuant to N.J.S.A. 2A:23B-15(a), "[a]n arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding." Further, AAA Rule 33 provides in pertinent part:

> (b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute . . . .
>
> (c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must still afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant . . . .

Guided by these principles, we reject defendant's argument that the arbitrator unreasonably denied defendant's request to postpone the proceedings. In this case, the arbitrator was within his authority to resume the hearings virtually. It is undisputed that the parties incorporated the AAA rules in their arbitration agreement clause and AAA Rule 33 undoubtedly provides the arbitrator with the authority to continue the hearings remotely. As the arbitrator noted, the AAA rules "permitted testimony and arbitration hearings [via] video conferencing long before the pandemic even began." The arbitrator, with the purpose of expediating the resolution of the dispute, properly required the parties to proceed virtually pursuant to AAA Rule 33. Thus, in confirming the arbitration award, the judge properly found the arbitrator's award was "[c]onsistent with his rulings, the applicable AAA Rules, and controlling statutes and case law."

Defendant's argument that it was unfairly prejudicial to have only one side present remotely is without merit as defendant has failed to produce any evidence of prejudice. In fact, despite the virtual setting, the arbitrator found defendant's expert witness "testified in a credible manner, and [was] clearly very qualified." The arbitrator even provided a setoff in the amount of $12,325 based on the defense expert's testimony.

Furthermore, as the judge astutely observed, the record clearly indicates that the arbitrator addressed defendant's concerns and continually tried to accommodate defendant, short of postponing the hearings indefinitely. When defendant was concerned based on the defense expert's testimony that its fact witnesses were not prepared to testify because they could not access their paper files, the arbitrator permitted those witnesses to testify at a later hearing. Regarding defendant's expert witness, the arbitrator stated he "felt completely comfortable understanding the testimony of [defendant's] expert[] and assessing his demeanor." Additionally, the arbitrator addressed defendant's concerns about being unable to talk with his attorney during the remote hearing by stating that defendant will be afforded the opportunity to talk to counsel upon request while the hearing is ongoing. Finally, the arbitrator provided defendant with the option to conduct the final hearings in person with social distancing and masks, but defendant, who still objected to remote hearings, refused. Therefore, the record does not reveal "sufficient cause for postponement."

We also reject defendant's argument that the trial court erred in granting plaintiff's request for attorney's fees. The award of attorney's fees is a matter left to the trial court's discretion and fee determinations should be disturbed only where there has been a clear abuse of discretion. Giarusso v. Giarusso, 455 N.J.

Super. 42, 51 (App. Div. 2018). A trial court's decision will constitute an abuse of discretion where "the decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Saffos v. Avaya Inc., 419 N.J. Super. 244, 271 (App. Div. 2011).

Here, defendant is only appealing the judge's award of attorney's fees as it related to confirming the arbitration award. Therefore, the only relevant statute is N.J.S.A. 2A:23B-25(c), which gives the court the authority to award attorney's fees post-award and does not require a contractual provision allowing fee shifting.[2] N.J.S.A. 2A:23B-25(c) states,

> [o]n application of a prevailing party to a contested judicial proceeding pursuant to section [twenty-two], [twenty-three], or [twenty-four] of this act, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, or substantially modifying or correcting an award.

Contrary to defendant's argument, the fee award is authorized by N.J.S.A. 2A:23B-25(c) and does not appear excessive. The judge, after properly finding plaintiff to be the prevailing party, awarded reasonable attorney's fees and made

[2] N.J.S.A. 2A:23B-21(b), which defendant relies on in its argument, does not apply because N.J.S.A. 2A:23B-21(b) relates to an arbitrator's authority to award attorney's fees pre-award.

the calculation of fees after reviewing plaintiff's certification of services. The judge found plaintiff "is entitled to an award of reasonable attorneys' fees and reasonable expenses of litigation because [this action] . . . was initiated as the appropriate means of enabling the arbitrator's decision to be enforced." The judge also found that plaintiff "demonstrates by way of its certification of services that a reasonable amount of time was provided in connection with represent[ing] the [p]laintiff in the instant litigation." Based on these findings, we discern no abuse of discretion.

Affirmed.