

Time Requested:
15 minutes

To be argued by
Louis E. Wolfe, Esq.

NEW YORK STATE SUPREME COURT
Appellate Division - Third Department

Wand Electric, Inc.

Petitioner-Appellant

-against-

Clinton County Highway Department,

Respondent.

**RESPONDING BRIEF AND APPENDIX - RESPONDENT
CLINTON COUNTY HIGHWAY DEPARTMENT**

Case #79028

Louis E. Wolfe, Esq.
Attorney for Respondent
10 Healey Avenue
P.O. Box #2867
Plattsburgh, New York 12901
(518) 561-1440

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STATEMENT OF QUESTIONS INVOLVED

1. Did the Supreme Court Special Term properly affirm the Arbitrators' award based upon the record before it?

Yes.

STATEMENT OF **FACTS**

This Arbitration Proceeding was commenced by the Petitioner-Appellant, Wand Electric, Inc., by filing of two (2) separate Demands for Arbitration.

The first Demand for Arbitration was filed on April 27, 1994 by Terry Chilton, President of Wand Electric,

The Petitioner-Appellant then filed a Petition to Vacate the Award on April 23, 1996. (A-5) The Petitioner-Appellant's claim was based upon CPLR S7511(b) (1) (iii), stating that the Arbitrators exceeded their power or so imperfectly executed it that a final award upon the subject matter submitted was not made.

In support of that argument Wand Electric, Inc. wanted two (2) awards, one on the general contract and the other on the electrical contract. Instead there was a combined award which has been stated.

It was claimed by Wand Electric that a claim was never filed within 21 days after recognition of the condition. S4.3 of Claims and Disputes in the contract. (RA-5)

The third ground is that the County of Clinton choose to finish the job on a time and materials basis rather than going with the surety of Wand Electric on a fix-priced basis.

Another argument was that the architect did not properly administer the contract. That the contractor, Wand, was never allowed to correct the non-conforming work. (A-6)

That because there was an alleged violation of the 40 Code of Federal Regulations Part 260, 261 and 263. (A-13) The arbitrators failed to reprimand or sanction the owner when they should have.

Finally, the contractor, Wand Electric, maintained they had the right to stop the work.

On the other hand, the County of Clinton in its answer submitted to the Court a detailed and annotated to the record a history of all of the issues brought forth in the lengthy analysis starting at (RA-6) and going through to (RA-34), which had previously been submitted to the arbitrators.

The County of Clinton gave notice on January 11, 1994 of a Notice of Intent to Terminate. (RA-35) In addition there was a letter dated January 5, 1994 regarding the plywood underlayment along with various other letters of meetings as well as notices of defective workmanship. (RA-37) See also deficiency list at

It should be pointed out that long after this Notice of Termination was submitted and the detailed list was submitted, Wand Electric continued to arbitrate this matter and did not attempt to set aside this arbitration based upon any breach of contract.

ARGUMENT

There is substantial evidence to sustain the Clinton County Supreme Court's decision to affirm the Arbitration Award. However, in the record submitted overall, very little of this evidence was submitted by the Petitioner-Appellant out of a record of 2,500 pages. There appears to be only 34 pages submitted to the trial Court for its consideration. In addition, there were well over one-hundred pages of Exhibits. The best record of what transpired in the hearing is set forth in the County's response which arguably favors the County's position. It does go through most of the record in the Process. See RA-6 through RA-34.

The first argument that the Petitioner-Appellant makes was that the Supreme Court Special Term failed to agree with the Petitioner-Appellant's position that the arbitrators had acted irrationally in so egregiously ignoring the contract. CPLR 7511 is the statute which governs the particular grounds upon which a Special Term can set aside an arbitrator's award under CPLR 7511 (b)(1)(iii). It seems to be the area which the Appellant feels is the only area that there may be for authority of the Special Term to upset the award of the arbitrators.

In this case this section says: "an arbitrator, or agency or person making the awarded exceeded this power or so imperfectly

executed it that a final and definite award upon the subject matter was not made." There is nothing in the record before the trial term to indicate that the three (3) arbitrators exceed their power or so imperfectly executed it that a final and definite award upon this subject matter **was** not made.

The Petitioner-Appellant cites Mt. St. Mary's Hospital V. Catherwood, 311 NYS2d 864 as a case where an arbitrator in a compulsory arbitration (*2) case has applied a wrong rule of law, particularly a rule of substantive law and held the Court should vacate the determination rather than let it stand as would be the case in voluntary arbitration. *2

In the Mt. St. Mary's case there was compulsory arbitration by virtue of §716 of the Labor Law and thus the Court held that the hospital was constitutionally justified in having a limited judicial review of the award. The Court stated at page 873 "due process of law requires, however, that the contract imposed by the arbitrator under the power conferred by statute have a basis not only in his good faith but in the law and the record before him."

The Court went on to say ¶ the arbitration article of CPLR has never been construed to include such a review but of course these were never occasioned for such review with respect to consensual arbitration."

Likewise cited by the Petitioner-Appellant is Furstenbura V. Aetna Casualty 617 Ad2d 580, 415 NYS2d, 849. Here there was arbitration under the No-Fault Insurance Law which is compulsory and not voluntary, Insurance Law §675(2).

The Court held as stated in Furstenburg "that the test in such cases is whether the award is supported by evidence or other basis in reason as may be appropriate and appearing in the record." Here, however, in the case at bar, arbitration was strictly a voluntary procedure adopted by all the parties to the contract. See National Coveraue Corp V. Kulesh (1994 1st Dept) 202 AD2d 368, 610 191. The arbitrator was held not to exceed his authority as limited by the provision of arbitration clause prohibiting him from modifying parties' contract, when he ordered termination of contract on ground of respondent's misconduct even though the contract was silent on subject of termination for cause; such limitation in the broad arbitration clause did not prevent arbitrator from fashioning a just remedy not provided for in the contract.

Just as important, however, in the case at bar was that Judge Dawson did not have before him the record in this case even though one was not required, one was made.

In this case there were two (2) contracts. There was no motion made to the arbitrators or to any Court during the proceeding to separate their decisions on the contracts. There was an admission on the part of the Respondent, the County of Clinton, that the amount of approximately \$18,841.20 was owed by the County to the Petitioner-Appellant on the Electrical Contract but conversely on the building contract there were damages owed to the County which exceeded, at least in the County's view and later adopted by the arbitrators, any monies owed to the Petitioner-Appellant.

It was held in Impdex Int'l Corp V. Worldwide Fabrics (1993, 1st Dept), 194 AD2d 388, 598 NYS2d 519, that where the arbitrator's award does not indicate how the amount awarded has been computed or that the arbitrator has included elements of damages specifically excluded by contract, it can not be concluded that the arbitrator exceeded his power under the contract.

Here this very issue of whether or not the electrical contract was considered by the arbitrators and whether or not there should have been a separate award for money owed on the electrical contract was brought before the arbitrators after the arbitration was closed and the award made. The Petitioner-Appellant's request to modify their award was denied. (M-44).

The third point brought out in the brief of the Petitioner-Appellant in this proceeding indicates that the arbitrators wrongfully let the respondent file a claim six (6) months after the contract termination. The section referred to in the contract is 4.33 of the General Construction Contract. All issues were raised in a letter terminating the contract dated January 14, 1994 (RA-31) Furthermore it was held in the case Re Dember Constr. Corp. (1993, 1st Dept) 190 AD2d 537, 593 NYS2d 212, that the respondent waived its right to contest the arbitrator's authority to determine whether the dispute was arbitrable by actively participating in arbitration for more than two (2) years rather than promptly seeking judicial determination of the arbitrability issue once it became clear that Petitioner was raising alleged non-arbitrable claims in an arbitration proceeding.

As can be seen this arbitration lasted almost two (2) years and there were 11 hearings and the Court was never approached as indicated it should have been in the Dember case. If in fact there was anything to the claim that the issues were not raised.

In the fourth point the claimant launches into what took up approximately 8 1/2 of the 11 days of testimony most of which were apparently rejected by the arbitrators; (A-16) Such as: (a) claims for Delay (A-17); (b) Causes for Claims other than delay (A-18).

The County's claim is based on a January 11, 1994 Notice of Intent to Terminate. (M-35) There were four (4) basic claims:



The Petitioner-Appellant did not provide a competent superintendent; (2) there was poor workmanship on most of the parts of the job including failure to provide work with the plans and specifications and defective and unacceptable workmanship when it was supposedly done in accordance with the plans and specifications; (3) the fact that Petitioner-Appellant failed to pay it's subcontractors and is an independent justification of the termination of the contract and (4) based upon the fact that the Petitioner-Appellant failed to keep the time limits even after they were extended by the respondent, within any agreed upon completion dates.

Each of these claims is backed up by the record and reference to the record but was not before the trial judge nor should it have to be because the burden of proving that the arbitrators' were irrational is one the Petitioner-Appellant has to carry.

A simple review, however, of the County's claim as set forth in RA-6 through RA-34 will show how each of these points were arrived at and how proof was submitted on each of these points.

The Petitioner-Appellant, on the other hand, attempted to explain away the poor workmanship through various devices including testimony of an expert even when the ceiling was not in line and out of measurement, even when the underlaying floor could be seen

through the carpet, even when the alleged superintendent of the job did not have a specifications book, even where their own expert said the vinyl wall covering had poor seams and irregularities in the wall showing through the covering and finally there was no question that the contractor failed to pay his subcontractors.

Wand made a further contention that there were various delays on the project caused by the owner. It was the County's position that these delays were caused by Wand itself and that they had not submitted any competent proof of any owner-caused delays. The building permit delay was seven (7) days and a 55 day delay was offered to more than compensate for that late start. (RA-45)

All of the other delays were explained in the following manner: submittals did not meet the specifications; there was in fact direct proof in regard to the vinyl wall covering saying that the delay did not change the installers work schedule at all; the floor covering caused no delays. All in all claims for delays were not backed up with competent proof.

In any event, there is nothing even approaching the requirements for setting aside an award provided for under CPLR 7511(b)(1)(iii) to wit: that the arbitrators exceeded their power or imperfectly exercised their power.

CONCLUSION

The award of the arbitrators was properly affirmed by the Supreme Court Special Term based upon the record before it.

Dated: July 1997

Respectfully submitted

Louis E. Wolfe, Esq.
Attorney for the Respondent,
County of Clinton
10 Healey Avenue
P.O. Box '2867
Plattsburgh, New York.12901
(518) 561-1440