LOUISE HENRY, Petitioner, -against- PATRICK J. MURPHY, Respondent.

M-82 (PART I JFK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2002 U.S. Dist. LEXIS 227
January 8, 2002, Decided
January 8, 2002, Filed

DISPOSITION: [*1] Petitioner Henry's motion to amend the petition pursuant to Fed. R. Civ. P. 15(a) granted. Petitioner Henry's motion to confirm the foreign arbitration award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 granted.

COUNSEL: For Petitioner: Noreen D. Arralde, Esq., Of Counsel, KENNY & STEARNS, New York, New York.

For Respondent: Kathleen M. O'Connell, Esq., Of Counsel, MURPHY & O'CONNELL, New York, New York.

< JUDGES: JOHN F. KEENAN, United States District Judge.

OPINIONBY: JOHN F. KEENAN

OPINION:

OPINION and ORDER JOHN F. KEENAN, United States District Judge:

Before the Court is Petitioner Louise Henry's ("Henry") motion to confirm a foreign arbitration award pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, codified at 9 U.S.C. @ 201 et seq. (the "Convention"), which was rendered by Michael M. Collins, Senior Counsel, in The Matter of an Arbitration between Louise Henry (as Executor for the Estate of the late James J. Henry, Deceased) and Patrick J. Murphy. Petitioner Henry also seeks leave to amend her petition filed July 11, 2001, pursuant [*2] to Fed. R. Civ. P. 15(a), because counsel for Henry mistakenly cited the wrong arbitration agreement in the petition. Respondent Patrick J. Murphy ("Murphy") opposes the motion to confirm the arbitral award. For the reasons stated below, Henry's motion to amend is granted and the arbitration award is confirmed.

Background

In early 1989, Daniel Lenihan, James J. Henry, Patrick J. Murphy and James Riordan, shareholders in Micro-bio (Ireland) Limited and Micro-bio (Ireland) (Export) Limited ("the companies"), agreed to sell all of the companies' shares to an entity called Campus Holdings Limited. During that time, a dispute arose between James J. Henry, who is now deceased, and Murphy regarding the disposition of a portion of the proceeds of the sale. On February 16, 1989, James Henry and Murphy agreed to place the disputed sum in escrow and to submit their dispute to binding arbitration. See Shareholder Agreement of February 16, 1989 ("Shareholders' Agreement"). Specifically, the February 16, 1989 agreement provides in relevant part: "In respect of the issued Redeemable Preference Shares amounting to 331,000 the sum of 132,400 will be put on deposit in this jurisdiction [*3] in the name of Patrick Murphy, Attorney at Law, on he giving an appropriate undertaking to hold the monies in this jurisdiction pending Arbitration as to the entitlement to this money of Mr. James Henry to same or Mr. Patrick

Murphy (or his clients) to same. Arbitration will be in this (Irish) jurisdiction and under Irish Law by a Senior Counsel to be agreed between the parties or in default of agreement to be appointed by the President of the Incorporated Law Society of Ireland, the finding of the Arbitration to be final and binding." See Shareholder Agmt. P 3.

On January 26, 1990, James Henry, through his counsel, wrote to the President of the Incorporated Law Society of Ireland requesting the appointment of an arbitrator to resolve the dispute concerning the disposition of the proceeds held in escrow. See Award of Arbitrator, November 27, 2000 P 9 ("Award"). In accordance with that request, the President appointed an arbitrator on March 8, 1990. Because of the subsequent appointment of the arbitrator as a judge of the High Court of Ireland, however, the arbitration proceedings stalled until Louise Henry, the sole executrix of James Henry's estate, served notice [*4] on Murphy on May 21, 1998, requesting that he concur in the selection of a new arbitrator. Id. at PP 17, 19. Murphy did not respond to this request; nor did he appear at the July 10, 2000 arbitration hearing after receiving proper notice of the arbitration. Id. at PP 20, 27. On November 27, 2000, an arbitrator in the Republic of Ireland rendered an award in favor of Henry against Murphy, in the amount of IR 132,400, plus interest in the amount of IR 53,524, as well as the costs of the arbitration. See id.

On July 11, 2001, Petitioner Henry filed a motion under the Convention seeking confirmation of the arbitration award. That petition, however, erroneously relies on an October 24, 1983 agreement, which was not the basis for the arbitration award. Accordingly, the Petitioner requests leave to amend the petition under Fed. R. Civ. P. 15(a) to refer to the February 16, 1989 arbitration agreement instead. Prior to the Petitioner's motion to amend, on August 31, 2001, the Respondent filed his answer opposing the request for an order confirming the arbitration award, arguing that the petition fails to meet the technical requirements of the Convention [*5] because, among other things, the Petitioner failed to annex the arbitration agreement relied upon by the arbitrator in rendering the arbitral award.

Discussion A. Motion for Leave to Amend the Petition

Rule 15(a) states that "a party may amend the party's pleading only by leave of the court or by written consent of the adverse party." Fed. R. Civ. P. 15(a). The decision to grant leave to amend is a matter that comes within the sound discretion of the district court. See Zahra v. Town of Southold, 48 F.3d 674, 685 (2d Cir. 1995). Nevertheless, Rule 15(a) instructs that a party shall be "freely given" leave to amend "when justice so requires." Rachman Bag Co. v. Liberty Mutual Insur. Co., 46 F.3d 230, 234-35 (2d Cir. 1995).

In deciding a motion to amend, a district court should consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party and futility of the amendment. See id.; Tokio Marine & Fire Insur. Co. v. Employers Insur. of Wasau, 786 F.2d 101, 103 (2d Cir. 1986). Prejudice to the opposing party is perhaps the most important factor to consider [*6] in ruling on a motion to amend. See

Rissman v. City of New York, 2001 U.S. Dist. LEXIS 18372, No. 01 Civ. 6284, 2001 WL 1398655, at *1 (S.D.N.Y. Nov. 9, 2001). For purposes of Rule 15(a), prejudice occurs if the opposing party would experience undue difficulty in defending a lawsuit because of a change of tactics or theories on the part of the movant. See Heslop v. UCB, Inc., 2001 U.S. Dist. LEXIS 21391, No. 01-2255, 2001 WL 1614154, at *1 (D. Kan. Dec. 13, 2001); see also Rissman,2001 U.S. Dist. LEXIS 18372, 2001 WL 1398655, at *1 n.1 ("In determining whether a party's interests have been unduly prejudiced, the Second Circuit has instructed district courts to consider 'whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; [or] (ii) significantly delay the resolution of the dispute.'") (quoting Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993)).

In the instant matter, Henry filed the present motion for leave to amend the petition on October 2, 2001, just two months after initially filing her petition. Furthermore, the only aspect of the petition that Henry seeks to amend is the reference [*7] to the incorrect arbitration agreement. In the Court's view, Murphy will not suffer prejudice due to the amendment because he will not have to expend significant additional resources in opposing the amended petition since the arbitration award annexed to the petition clearly referred to the November 16, 1989 agreement as the basis for the award. In addition, the amendment will not significantly delay resolution of this matter given the fact that Murphy already has submitted papers opposing confirmation of the amended petition. Accordingly, Henry's motion to amend is granted.

B. Request for an Order Confirming a Foreign Arbitration Award

Petitioner moves this Court to confirm an arbitral award rendered in the Republic of Ireland. This dispute falls under the Convention because Henry seeks enforcement of an arbitration award in the United States, a nation other than the Republic of Ireland, the nation where the award was rendered. See Convention, Art. I ("This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought"). The legislation [*8] implementing the Convention provides that "within three years of any arbitral award any party to the arbitration may apply to any court with jurisdiction for an order confirming the award against any other party to the arbitration." 9 U.S.C. @ 207. A court must confirm the award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention." Id. Indeed, in an action to confirm an award rendered in a foreign jurisdiction, the grounds for relief set forth in Article V of the Convention are the only grounds available for refusing to enforce an arbitral award. See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997). The party opposing confirmation bears the burden of demonstrating grounds for setting aside the award. See Matter of Arbitration between Continental Grain Co. v. Foremost Farms Inc., 1998 U.S. Dist. LEXIS 3509, No. 97 Civ. 0848, 1998 WL 132805, at *2 (S.D.N.Y. Mar. 23, 1998).

Respondent Murphy asserts several reasons why this Court

should deny the Petitioner's motion to confirm the arbitration award. First, the Respondent argues that the February [*9] 1989 agreement does not constitute an arbitration agreement under Irish law, thereby violating Article V, Section (1)(a) of the Convention, which states that a court may refuse to enforce an award if the "agreement is not valid under the law to which the parties have subjected it." Convention, Art. V, @ 1(a). To invoke this section, the party opposing enforcement must furnish the court with proof of specific grounds for denying the petition - in this case, proof that the parties' agreement did not constitute a valid arbitration agreement under Irish law. See id. Despite this obligation, Murphy provides no support for his assertion. Rather, he merely quotes the definition of an arbitration agreement set forth in the Irish Arbitration Act of 1980, which, according to Murphy's submission, defines an arbitration agreement as "an agreement in writing including an agreement contained in an exchange of letters or telegrams, to submit to arbitration present or future differences capable of settlement by arbitration." Respondent's Mem. at 7. This definition does nothing to undermine the Irish arbitrator's determination that the provision in the parties agreement, quoted earlier in this [*10] decision, constituted a valid arbitration clause. The Court, therefore, finds that Murphy has failed to meet his burden of demonstrating that the Irish arbitrator failed to comply with Irish law by giving effect to the parties' apparent intent to submit the escrow dispute to arbitration.

Next, Murphy argues that even if the February 1989 agreement contains a valid arbitration agreement, the arbitration proceeding before Michael M. Collins, Senior Counsel, was time-barred, since Irish law precludes actions on contract or an arbitration proceeding brought more than six years after the date of the agreement. See Respondent's Mem. at 9. Again invoking the Section 1(a) defense to confirmation, Murphy argues that the Court should refuse enforcement because the applicable statute of limitations precluded the arbitration proceeding. Murphy makes this argument despite the fact that James Henry originally commenced the arbitration back in January 1990. See Award P 9. Even putting that fact aside, the Court believes that Murphy should have raised this defense to the arbitrator during the arbitration hearing, not to this Court in his submission opposing confirmation under the Convention. [*11] Accordingly, the Court rejects Murphy's statute of limitations defense.

Murphy also argues that the Court should deny enforcement of the award because it did not arise from a commercial legal relationship. The Court disagrees and finds that the February 1989 agreement arose out of a dispute involving a commercial relationship within the meaning of the Convention, namely, a conflict between corporate shareholders regarding the proceeds of a stock transaction. Therefore, the Court rejects Murphy's argument that the Convention does not apply here.

Finally, Murphy claims that the Court should not enforce the award because to do so would violate the public policy of the United States. Under Section 2, a court can refuse enforcement where "the recognition or enforcement of the award would be contrary to the public policy of that country." Convention, Art. V,

@ 2(b). This very narrow public policy defense applies "only where enforcement would violate [the forum state's] most basic notions of morality and justice." Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 315 (2d Cir. 1998) (quoting Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150, 152 (2d Cir. 1984)). [*12] This is not that case. The Court sees no public policy violation triggered by confirmation of the award.

Conclusion

The Court grants Petitioner Henry's motion to amend the petition pursuant to Fed. R. Civ. P. 15(a). The Court also grants Petitioner Henry's motion to confirm the foreign arbitration award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. SO ORDERED.

Dated: New York, New York
January 8, 2002
JOHN F. KEENAN
United States District Court