

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, SECOND DEPARTMENT**

Atlantic Purchasing, Inc. v. Airport Properties II, LLC

77 A.D.3d 824 (N.Y. App. Div. 2010) · Decided October 19, 2010

SUMMARY

The New York Appellate Division, Second Department, affirmed an order denying Airport Properties II, LLC's motion to vacate an arbitration award and granting Atlantic Purchasing, Inc.'s petition to confirm it. The court held that Airport waived its claim of arbitrator partiality by failing to object after learning of the arbitrator's prior relationship with Airport's counsel and continuing to participate in the arbitration. The court also found no evidence that the prior arbitration affected the arbitrator's neutrality and remitted the matter for entry of an appropriate judgment.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Covello, J.P.; Santucci, J.; Balkin, J.; Austin, J.
JURISDICTION	New York
DECIDED	October 19, 2010
DISPOSITION	affirmed
PROCEDURAL POSTURE	Airport Properties II, LLC appealed an order denying its motion to vacate an arbitration award and granting Atlantic Purchasing, Inc.'s petition to confirm the award.
STANDARD OF REVIEW	An arbitration award may be vacated only on the statutory grounds set forth in CPLR 7511; a party's claim of arbitrator partiality may be waived by failing to object after learning the basis for the alleged bias and continuing to participate in the arbitration.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Airport Properties II, LLC, also known as Airport Properties II, Inc. v. Atlantic Purchasing, Inc.

TOPICS

arbitration

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether Airport waived its claim that the arbitrator was partial or lacked impartiality by failing to object after learning of the arbitrator's prior relationship and continuing to participate in the arbitration.
2. Whether the arbitrator's nondisclosure and alleged prior relationship provided a basis to vacate the award under CPLR 7511(b)(1)(ii).

HOLDINGS

1. A party waives a claim that an arbitrator is not impartial when, after becoming aware of the basis for the alleged bias or partiality, it fails to object and continues participating in the arbitration.
2. The award was not subject to vacatur under CPLR 7511(b)(1)(ii) because there was no evidence that the prior arbitration affected the arbitrator's ability to remain neutral.

KEY QUOTATIONS

"However, a party can waive a contention that an arbitrator is not impartial by failing to raise that allegation upon becoming aware of the basis for the alleged bias or partiality, and thereafter participating in the arbitration" (825)

"In any event, there is no evidence to demonstrate, or even suggest, that the prior arbitration had any effect upon the arbitrator's ability to be neutral in the instant matter." (826)

FACTUAL BACKGROUND

The parties entered into a contract requiring arbitration of disputes. Atlantic claimed that Airport owed it more than \$700,000 for goods and services and demanded arbitration before an American Arbitration Association-appointed arbitrator. On the second day of the hearing, the arbitrator disclosed to Airport's counsel, who was also an Airport principal, that he had previously served as arbitrator in an unrelated matter in which counsel represented a party. Counsel did not object or notify the AAA, and the arbitrator subsequently awarded Atlantic \$771,474.19.

PROCEDURAL HISTORY

The parties' contract required arbitration of disputes. After an arbitrator awarded Atlantic \$771,474.19, Atlantic petitioned the Supreme Court, Orange County, to confirm the award. Airport moved to vacate based in part on the arbitrator's alleged failure to disclose a prior relationship with Airport's counsel, but the Supreme Court denied the motion and confirmed the award; the Appellate Division affirmed and remitted for entry of judgment.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The matter was remitted to the Supreme Court, Orange County, for entry of an appropriate judgment pursuant to CPLR 7514(a).

CASES CITED

- Matter of Siegel (Lewis), 40 N.Y.2d 687 (1976)
- Matter of J.P. Stevens & Co. (Rytex Corp.), 34 N.Y.2d 123 (1974)
- Matter of Raitport v. Salomon Smith Barney, Inc., 57 A.D.3d 904, 906 (2008)
- Matter of Reilly v. Progressive Ins. Co., 5 A.D.3d 776, 777 (2004)
- Matter of Arner v. Liberty Mut. Ins. Co., 233 A.D.2d 321 (1996)
- Matter of Rothman v. RE/MAX of N.Y., 274 A.D.2d 520 (2000)

OPINION

Atlantic Purchasing, Inc. v. Airport Properties II, LLC 77 A.D.3d 824
PER CURIAM.

In a proceeding pursuant to CPLR article 75 to confirm an arbitration award, Airport Properties II, LLC, also known as Airport Properties II, Inc., appeals from an order of the Supreme Court, Orange County (Ritter, J.), entered October 22, 2009, which denied its motion to vacate an award in the principal sum of \$771,474.19 and granted the petition to confirm the award. Ordered that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Orange County, for the entry of an appropriate judgment (see CPLR 7514 [a]). The parties entered into a contract which provided, inter alia, that disputes arising thereunder would be arbitrated. In 2008 the petitioner, Atlantic Purchasing, Inc. (hereinafter Atlantic), claimed that it was owed more than \$700,000 from the appellant, Airport Properties II, LLC, also known as Airport Properties II, Inc. (hereinafter Airport), for certain goods and services, and it demanded arbitration. In accordance with the contract, the arbitration of the claim was scheduled before an arbitrator appointed by the American Arbitration Association (hereinafter the AAA). According to Jay F. Jason, who is both counsel for *825Airport and a principal thereof, on the second day of the arbitration hearing the arbitrator informed Jason that he had been the arbitrator in a prior unrelated proceeding in which Jason represented one of the parties. Jason also alleged in his affidavit that the arbitrator further advised that there was no need to disclose this “prior relationship” to the AAA since the arbitrator had ruled in favor of Jason’s client at the prior arbitration. Jason did not object to the arbitrator continuing to act as the arbitrator in this dispute, nor did Jason inform the AAA about the conversation. The arbitrator ruled in favor of Atlantic, which thereafter petitioned to confirm the award. Airport moved to vacate the award, claiming, inter alia, that the arbitrator’s failure to timely and properly disclose his prior relationship with Jason was prejudicial to Airport. The Supreme Court denied Airport’s motion and confirmed the award, finding, among other things, that Airport waived any claim that the arbitrator was biased since it did not raise any objection

concerning the arbitrator until after the award had been rendered and that, in any event, there was no evidence of such bias. We agree. An award rendered after an arbitration conducted pursuant to the terms of a contract may only be vacated upon one of the grounds set forth in CPLR 7511. Insofar as is pertinent here, that statute provides that an arbitration award shall be vacated upon the motion of a party to the arbitration “if the court finds that the rights of that party were prejudiced by . . . misconduct in procuring the award [or] partiality of an arbitrator appointed as a neutral” (CPLR 7511 [b] [1] [i], [ii]). However, a party can waive a contention that an arbitrator is not impartial by failing to raise that allegation upon becoming aware of the basis for the alleged bias or partiality, and thereafter participating in the arbitration (see *Matter of Siegel [Lewis]*, 40 NY2d 687 [1976]; *Matter of J.P. Stevens & Co. [Rytex Corp.]*, 34 NY2d 123 [1974]; *Matter of Raitport v Salomon Smith Barney, Inc.*, 57 AD3d 904, 906 [2008]; *Matter of Reilly v Progressive Ins. Co.*, 5 AD3d 776, 777 [2004]; *Matter of Arner v Liberty Mut. Ins. Co.*, 233 AD2d 321 [1996]). Here, although the arbitrator should have disclosed the prior arbitration to the AAA and to both parties, the Supreme Court correctly concluded that Airport, “by failing to raise the issue of such circumstance, despite being informed of the same at the very beginning of the arbitration, waived any argument that it gave rise to a justifiable doubt as to the arbitrator’s impartiality or independence, or as to bias, and is estopped from doing so now” (see *Matter of Rothman v RE/MAX of N.Y.*, 274 AD2d 520 [2000]). In any event, there is no evidence to demonstrate, or even suggest, that the prior arbitration had any effect upon the arbitrator’s ability to be neutral in the instant matter. Accordingly, there was no basis for vacatur of the award pursuant to CPLR 7511 (b) (1) (ii). Airport’s remaining contentions are without merit. Covello, J.P., Santucci, Balkin and Austin, JJ., concur.