Superior Court of Connecticut,
Judicial District of Stamford-Norwalk.
WHITNEY & WHITNEY, LLC
v.
Joshua GOLDMAN.
No. CV030197485.

April 29, 2004.

Robert Rafferty, Purchase and John Merchant, Stratford, for Whitney & Whitney.

Cohen & Wolf PC, Bridgeport, for Joshua Goldman.

D'ANDREA, J.T.R.

***1** The plaintiff, Whitney & Whitney, LLC, brings this application to confirm an arbitration award in its favor against the defendant, Joshua Goldman. The application, brought in timely fashion pursuant to Conn. Gen. Statutes § 52-417, seeks the confirmation of an award of the arbitrator in the amount of $29,623.57 for a claimed balance due under a construction contract which provides in writing for arbitration in the event of a dispute.

The arbitration award is dated August 15, 2003. No motion to vacate the award was filed by the defendant pursuant to Conn. Gen. Statutes § 52-420, but he filed an objection to the application to confirm the award on November 7, 2003, more than 30 days from the notice to him of the award. In his objection, the defendant claims that the arbitrator's award should not be confirmed because (1) the arbitrator lacked the authority to enter any award, and (2) the arbitrator refused to hear evidence pertinent and material to the controversy, pursuant to Conn. Gen. Statutes § 52-418(3).

The defendant claims that the arbitrator lacked the authority to enter any award because the conditions precedent to arbitration, contained in the contract, were not fulfilled and therefore the arbitrator lacked subject matter jurisdiction.

Paragraph 9.10.1 of the contract provides that claims and disputes shall be initially referred to the architect for decision, although this step is not described as a condition precedent to arbitration. After initial decision by the architect, the matter shall be subject to mediation, as a condition precedent to arbitration. The defendant argues that the claim was never submitted to the architect for decision, not did any mediation ever take place.

"The authority of the arbitrator is a subject matter jurisdiction issue, and as such it may be challenged at any time prior to a final court judgment." *Bennet v. Meader,* 208 Conn. 352, 364, 545 A.2d 553 (1988). Accordingly, the defendant is not limited by the time constraints of Conn. Gen. Statutes § 52-420 with regard to the issue of jurisdiction. However, the defendant has the burden of proving that the requirements of the contract were not met and that the arbitrator was without jurisdiction to hear the case ... [T]he burden rests on the party attacking the award to produce evidence sufficient to invalid or avoid it." *Von Langendorff v. Riordan,* 147 Conn. 524, 527, 163 A.2d 100 (1960).

Pursuant to Sec. 9.10.1 of the contract between the parties, claims and disputes "shall be referred initially to the architect for decision."There was testimony at the hearing from both a principal of the plaintiff and the plaintiff's attorney at the time that the dispute was referred to the architect sometime between the emergence of the dispute in the spring of 2002 and September 23, 2002. Patrick Delorio, the attorney, had several conversations with the architect during that period. In response, the architect signed the application and certificate of payment dated September 23, 2002. In the contractor's application for payment, the contractor certified that "current payment shown herein is now due."In numbered line 8 the "current payment due" for which application is made for payment, is shown as $27,255.58. The defendant makes much of the fact that the line entitled "amount certified" by the architect is left blank, although the architect signed the certification portion of the document. In the absence of evidence to the contrary, the court interprets the document in the most logical fa-

shion: that the "current payment due" to the contractor was certified by the architect to be $27,225.58; that if the architect intended to certify something less than the claimed current amount due, he would have stated the lesser amount so certified; that by signing the "amount certified" portion of the document, knowing the amount being claimed by the contractor, his intention was to approve and certify the amount requested, and none other. Intent is a question of fact and must be determined in light of all the relevant circumstances.

***2** Nevertheless, however one interprets the document, and even if the architect's decision is technically flawed, it does not change the face of this case. The evidence is clear that the dispute was "referred initially to the architect for decision."There is no requirement that the referral be in writing, or that there be a written record of the referral, or even that the architect render a decision at all. It is to be noted that referral to the architect is *not* labeled as a condition precedent to arbitration, nor is a decision by the architect a condition precedent while mediation is.[FN1] Whatever the decision of the architect, or in the absence of a decision, the matter is still subject to mediation as a condition precedent to arbitration. The submission by the plaintiff to the architect of the application for payment was sufficient to constitute a referral to the architect for decision as set forth in the contract and to set in motion a required course of mediation.

> FN1. The contract, Sec. 9.10.1 reads in pertinent part as follows; "... after initial decision by the architect *or thirty days after submission of the matter to the architect,*" the matter shall "... be subject to mediation as a condition precedent to arbitration ..." (emphasis added).

Pursuant to the contract, after the architect signed the certificate of payment the plaintiff filed with the American Arbitration Association a request for mediation. The defendant never cooperated with this request and thereafter the plaintiff filed its claim for arbitration. The defendant presented no evidence to show that he did anything other than thwart the mediation process.[FN2] The Court finds that the plaintiff performed all necessary acts to comply with the terms of the contract, its efforts to pursue mediation were futile, and the defendant produced no evidence that the arbitrator was without jurisdiction to proceed to hear and decide the case.

> FN2. The defendant testified that mediation never took place because he didn't like the names of the mediators presented, and that the mediation was to take place in East Hartford. The defendant demonstrated no foundation for either of these excuses, which are not credible and lack good faith.

The defendant's second reason why the arbitrator's award should not be confirmed is that the arbitrator refused to hear evidence pertinent and material to the controversy, pursuant to Conn. Gen. Statutes § 52-418(3). For the reasons that follow, this claim of the defendant must, as a matter of law, also fail.

"The court or judge shall grant ... an order confirming the award unless the award is vacated, modified or corrected as prescribed in §§ 52-418 and 52-419."Conn. Gen. Statutes § 52-417. "No motion to vacate, modify or correct an award may be made after 30 days from the notice of the award to the party to the arbitration who makes the motion."Conn. Gen. Statutes § 52-420(b). The defendant in this case never filed a motion to vacate. However, even if the court were to treat his objection to the plaintiff's application for confirmation of the award as a motion to vacate, this objection fails because it was filed on November 7, 2003, more than 30 days after notice of the award dated August 15, 2003. The defendant makes an argument that the 30-day limit of Conn. Gen. Statutes § 52-420 does not apply because that section is not mentioned along with §§ 52-418 and 52-419 in § 52-417 referencing the confirmation of an award. The defendant's claim is meritless, the language, meaning and intent of Conn. Gen. Statutes § 52-420 being abundantly clear.[FN3] Furthermore, Conn. Gen. Statutes § 52-420(a) emphasizes that the Court is to dispose of these cases "with the least possible delay." The 30-days limitation for motion to vacate in 52-420(b) carries forward that mandate.

> FN3.Conn Gen. Statutes § 52-420(b) reads as follows: "No motion to vacate, modify or correct an award may be made after 30 days from the notice of the award to the party to the arbitration who makes the motion."

***3** Although the court believes the burden of proving

lack of jurisdiction rests with the defendant; *Von Langendorff v. Riordan, supra,* 147 Conn. at 527; the court also finds that the plaintiff's evidence has shown, and the plaintiff has proven, that the arbitrator possessed jurisdiction to hear the case and render his award. Accordingly, the plaintiff's application to confirm the arbitration award is granted, and the defendant's objection thereto is overruled.

So Ordered.

Conn.Super.,2004.
Whitney & Whitney, Llc v. Goldman
Not Reported in A.2d, 2004 WL 1098817 (Conn.Super.)

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