Ray's Construction Expert Masory, LLC v. Unifirst Corp., 022311 CTSUP, CV106007330

Ray's Construction Expert Masory, LLC

v.

Unifirst Corporation

No. CV106007330

No. 114642

Superior Court of Connecticut

February 23, 2011

Caption Date: February 23, 2011

Judicial District of Stamford-Norwalk at Stamford

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Jennings, Alfred J., J.T.R.

CORRECTED MEMORANDUM OF DECISION ON AMENDED APPLICATION TO VACATE ARBITRATION AWARD (NO. 102)

ALFRED J. JENNINGS, Jr. Judge.

(This corrected memorandum of decision is filed to correct several typographical errors and an omission in the original memorandum of decision dated February 16, 2011. The corrections do not affect the outcome.)

The underlying issue between the parties is a contract dispute. The plaintiff is in the construction business. The defendant is engaged in the business of renting uniforms and other items to business, industrial, and commercial concerns. The parties entered into a contract on or about October 28, 2008 whereby the defendant would rent and clean/replace employee uniforms and other items to the plaintiff for agreed fees. The agreement had a term of 60 months and provided for automatic successive renewals of like periods unless the plaintiff gave written notice of nonrenewal at least 90 days prior to the next expiration date. The contract also contained a liquidated damages clause and a binding arbitration clause which are reproduced below.

If Customer [plaintiff] breaches or terminates this Agreement before the expiration date for any reason (other than UniFirst's failure under the performance guarantee described above). Customer will pay UniFirst [defendant], as liquidated damages and not as a penalty (the parties acknowledging that actual damages would be difficult to calculate with reasonable certainty) an amount equal to 50% of the average weekly amounts invoiced in preceding 26 weeks multiplied by the number of weeks remaining in the current term. The damages will be in addition to any other obligations or amounts owed by Customer owed by Customer to UniFirst including the return of Merchandise or the payment of Replacement charges.Any disputes of whatever kind between the customer and UniFirst... arising out of or relating to the negotiation, formation, or performance of this Agreement shall be resolved exclusively by final and binding arbitration. The arbitration shall be conducted... pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association and governed by the Federal Arbitration Act.

A dispute arose between the parties in 2009 as to their mutual obligations under the contract. The plaintiff terminated the Agreement on April 9, 2009 prior to expiration of its full term. Plaintiff claimed that the termination was caused by defendant's breach by inadequate performance, such as the number of uniforms provided. Defendant claimed that the plaintiff had

breached the Agreement by early termination and insisted on payment of liquidated damages for the remainder of the term of the Agreement. The dispute went to arbitration, administered by the American Arbitration Association (AAA). Following an evidentiary hearin, although not obligated by the AAA Commercial Arbitration Rules to do so, [1] the arbitrator wrote a reasoned award, finding the issues in favor of the defendant. He found that "Respondent [Ray's Construction] breached the agreement by ceasing to make payments. This breach terminated Claimant's [UniFirst's] obligations to perform further under the agreement and causing the liquidated damages clause to come into play." (Finding No. 11.) He awarded liquidated damages of $28, 620.55 plus interest of $7, 727.47 and ordered Ray's Construction to pay administrative fees of $2, 550 and the arbitrator's fee of $800.

Now before the court is the plaintiff's amended application under Conn. Gen. Stat. §52-420 to vacate the arbitration award. Section 52-420(a) provides that "Any application under Section 52-417, 52-418, or 52-419 shall be heard in the manner provided by law for hearing written motions at a short calendar session, or otherwise as the court or judge may direct, in order to dispose of the case with the least possible delay." Section 52-417 concerns an application to affirm an award, and §52-419 concerns the modification or correction of an award, neither of which are involved with this application. The operative statute governing the resolution of this application is Conn. Gen. Stat. §52-418 concerning vacating of an arbitration award which provides (in language almost identical to the Federal Arbitration Act, 9 U.S.C §10) that:

Upon the application of any party to an arbitration, the superior court... shall make an order vacating the award if it finds any of the following defects:(1) if the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing on sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made.

The only claim of error or "defect" advanced by the plaintiff is that the arbitrator enforced the liquidated damages clause of the Agreement and in doing so rejected plaintiff's argument that the liquidated damages clause was unenforceable as a matter of law, and failed to follow the precedent of a Superior Court decision involving a dispute between UniFirst and another customer, Rubino Bros, Inc. involving a very similar liquidated damages clause which was not enforced by the court.[2] The only subsection of §52- 418 possibly implicated by this claim of error would be subsection (4) (exceeding or imperfect execution of arbitral powers). The analysis can be broken down into two components: (1) What did the *Rubino Bros*. Case actually hold?, and (2) Was the arbitrator's award in this case contrary to the holding of the *Rubino* case such that he exceeded or imperfectly executed his arbitral powers?

1. The *UniFirst v. Rubino Bros*. Decision

UniFirst Corporation v. Rubino Bros, Inc., Docket No. CV03-0402099S, Superior Court, Judicial District of Fairfield at Bridgeport (October 8, 2004, Bruce Levin, J.), 2004 Conn.Super. LEXIS 3145, involved a civil lawsuit commenced by UniFirst (the same entity as the defendant herein)

against another customer, Rubino Bros., Inc., for breach of a written contract to rent industrial uniforms. The case was tried before Judge Bruce L. Levin sitting as the court without a jury. The UniFirst form contract was similar to the contract signed here by Ray's Construction. The liquidated damage clause provided: "In the event of termination prior to expiration, the Customer agrees to purchase garments issued to them... at replacement costs then in effect or to pay 50% of applicable charges for the remainder of the term, whichever is greater." There was a threshold issue whether or not the customer had effectively given written notice of non-renewal before stopping payments under the contract. The court found that effective written notice of non-renewal was not given, and that Rubino Bros. had breached the contract which had renewed for an additional five-year term. UniFirst argued for liquidated damages under its agreement. The customer raised the issue of invalidity of the liquidated damages clause, arguing that it was an unenforceable penalty. The court's analysis of that issue is quoted:

"A contractual provision for a penalty is one the prime purpose of which is to prevent a breach of the contract by holder over the head of a contracting party the threat of punishment for a breach... A provision for liquidated damages, on the other hand, is one the prime purpose of which is to fix fair compensation to the injured party for a breach of contract." (Citation omitted.) *Berger v. Shanahan*, 142 Conn. 726, 731, 118 A.2d 311 (1955). "It is... well settled that a contract provision which imposes a penalty for breach of contract is invalid, but a provision which allows liquidated damages for breach of contract is enforceable if certain provisions are satisfied." *Norwalk Door Closer Co. v. Eagle Lock & Screw Co.*, 153 Conn. 681, 686, 220 A.2d 263 (1966). The requisite three conditions are that (1) the damage which was to be expected as a result of a breach of contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable. *Berger v. Shanahan*, 142 Conn. 726, 732, 118 A.2d 1296 (1985). Where a party injured by a breach of contract seeks to enforce a liquidated damages clause "the burden of persuasion about the enforceability of the clause naturally rests with its proponent." *Vines v. Orchard Hills, Inc.*, 181 Conn. 501, 511, 435 A.2d 1022 (1980).

Rubino Bros., supra, *9-*10.

Applying these tests to the evidence before him Judge Levin found "... the plaintiff did not sustain its burden with respect to the first and third conditions to satisfy the validity of the clause. Indeed it did not endeavor to do so." *Id.,* *10. Finding also no proof of actual damages sustained by the plaintiff the court awarded UniFirst only nominal damages of one dollar.

Plaintiff argues that the *Rubino Bros*. case established as the law in Connecticut that UniFirst Corporation's standard form liquidated damages provision is an illegal penalty clause and is unenforceable. Defendant argues that "[t]he Court did not rule that the defendant's contract was illegal. The court entered judgment on behalf of Unifirst Corporation on its express contract claim. The Court ruled that the Contract was enforceable, but that Defendant had not borne its burden of proof with respect to the amount of damages claimed..." (Def. Memorandum, p. 2, 3). Neither party is wrong because the arguments are like "ships passing in the night." Plaintiff is talking about the liquidated damages provision of the agreement; defendant is talking about the entire agreement.

The *Rubino* court did refuse to enforce a Unifirst liquidated damages provision almost

identical to the one in the Ray's Construction contract. But the ruling was not set forth as illegality or unenforceability as a matter of law. The decision turned on burden of proof and the total lack of evidence before the court to satisfy two of the three necessary criteria to establish a valid liquidated damages clause. Judge Levin mentioned at page *7 that Rubino Bros "... failed to brief its special defense of invalidity of the liquidated damages clause of the contract" and, as quoted above, Unifirst Corporation "did not even endeavor" to meet its burden of proving two of the three elements. This is a holding that the UniFirst form liquidated damages provision was unenforceable when UniFirst made no effort to have it upheld. The case has little if any precedent value. It would be like arguing one jury verdict as precedent for a similar verdict in another case.

2. Abuse of Arbitral Power

The scope of review of claims under Conn. Gen. Stat. §52-418(a)(4) was stated in *McCann v. Dept. of Environmental Protection,* 288 Conn. 203, 220-21 (quoting from *Industrial Risk Insurers v. Hartford Steam Boiler Inspection and Ins. Co*., 273 Conn. 86, 94-95):

[In construing §52-418(a)(4)] we have, as a general matter looked to a comparison of the award with the submission to determine whether the arbitrators have exceeded their powers... We have also recognized, however, that an arbitrator's egregious misperformance of duty may, however, warrant rejection of the resulting award. In *Darien Education Assn. v. Board of Education,* 172 Conn. 434, 437-38, 3744 A.2d 1081 (1977), we noted that [i]f the memorandum of an arbitrator revealed that he had reached his decision by consulting a Ouija board, surely it should not suffice that the award conformed to the submission... An award that manifests an egregious or patently irrational application of the law is an award that should be set aside pursuant to §52-418(a)(4) because the arbitrator exceeded [his] powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. We emphasize, however, that the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles...In *Garrity* [*v. McCaskey*, 223 Conn. 1, 7-8, 612 A 2d 742 (1992)] we adopted the test enunciated by the United States Court of Appeals for the Second Circuit in interpreting the federal equivalent of §52-418(a)(4)... The test consists of the following three elements, all of which must be satisfied in order for a court to vacate an arbitration award on the ground that the arbitration panel manifestly disregarded the law: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator, (2) the arbitration panel appreciated the existence of a clearly governing legal principle, but decided to ignore it; and (3) the governing law alleged to have been ignored by the arbitration panel is well defined, explicit, and clearly applicable. (Internal quotation marks omitted.) *McCann*, at 220-21.

Although he did not cite the *Berger v. Shanahan* case, *supra*, or any case, the arbitrator, Attorney Houston Putnam Lowry, correctly relied upon the three-part *Shanahan* test as is evident from his findings.

Shanahan Part One: Claimant would have to prove its lost profits for the balance of the contract term once Respondent breaches-which would have been difficult in the absence of a liquidated damages clause. This fact was acknowledged in the agreement of the parties. (Arbitrator Finding No. 8).*Shanahan Part Two*: The parties are presumed to intend what was contained in their written

agreement, even if one party failed to read the agreement before signing it. Therefore, the parties intended to have a liquidated damages clause. (Arbitrator Finding No. 9).*Shanahan Part Three*: The liquidated damages clause was reasonable in amount because it essentially assumes a 50% profit margin (which is not that uncommon). (Arbitrator Finding No. 10).

The arbitrator used the correct test of the elements which must be proved by the proponent of a liquidated damages clause to sustain its enforceability, and, based on the evidence before him, found that the test had been satisfied by UniFirst Corporation in this case (unlike *Rubino* where the court had found no effort put forth to satisfy that test). There was no manifest disregard of the law or "egregious or patently irrational application of the law, " or "extraordinary lack of fidelity to established legal principles." There was no "defect" in the proceedings as defined in Conn. Gen. Stat. §52-418. Consequently there is no ground to vacate the award.

Order

The plaintiff's Amended Application to Vacate Arbitration Award is denied.

Notes:

[1] Rule 41(b) provides that "The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."

[2] Plaintiff is not claiming that UniFirst is bound by the holding of the *Rubino Bros.* case under the doctrine of collateral estoppel. See *Aetna Casualty & Surety Company v. Jones*, 220 Conn 285, 299-303 (1991) (Mutuality of parties requirement abandoned for application of collateral estoppel). Plaintiff is relying on *Unifirst Corp. v. Rubino* strictly as legal precedent. "*It is the law, in Connecticut and elsewhere,* that Unifirst's standard form liquidated damages provision is an illegal penalty clause, and is unenforceable." (Citing and attaching a copy of the *Rubino* decision) (Emphasis added.) Respondent's [Ray's Construction's] Proposed Findings of Fact, Conclusion and Award, 9/28/10, p. 6. No collateral estoppel analysis was presented to this court nor is there any indication that a collateral estoppel analysis was presented to the arbitrator. Paragraph 7 of the instant application to vacate claims that the award was made "notwithstanding the state of the law..." which clearly implies an argument only of legal precedent.
