2011 IL App (1st) 110528-U

THIRD DIVISION
November 9, 2011

No. 1-11-0528

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PHILIP S. WALKENSHAW and DAVID IVES,	)	Appeal from the
	)	Circuit Court of
Petitioners-Appellants,	)	Cook County
v.	)	
	)	No. 10 CH 35147
ASPEN MARKETING SERVICES, INC.,	)	
	)	
Respondent-Appellee.	)	Honorable
	)	Richard J. Billik
	)	Judge Presiding.
	)	

JUSTICE MURPHY delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

O R D E R

¶ 1 *HELD*: The arbitrator did not exceed his authority by considering employee benefits costs that allegedly had not been disputed prior to arbitration in issuing his decision and award where it was necessary for him to consider such costs to resolve the parties' dispute over whether petitioners were entitled to deferred consideration.

¶ 2 Petitioners, Philip Walkenshaw and David Ives, appeal from an order of the circuit court of Cook County denying their application to modify or vacate an arbitration award and granting the crosspetition to confirm the award filed by respondent, Aspen Marketing Services, Inc. On

appeal, petitioners contend that the court erred by denying their application to modify or vacate the arbitration award where the arbitrator exceeded his authority by considering matters not in dispute in rendering the award. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On June 29, 2007, respondent entered into an asset purchase agreement with The Townsend Agency, Ltd. (Townsend), whereby it acquired assets and assumed liabilities of a business unit of Townsend, thus forming an Aspen-Townsend unit. Section 2(g) of the purchase agreement provided that respondent would pay petitioners deferred consideration of $1,240,195 if Aspen-Townsend met or exceeded a revenue target of $7.13 million and an earnings target of $1.3 million for the calendar year of 2007. Section 2(g) also provided that respondent would pay petitioners a *pro rata* portion of the deferred consideration if Aspen-Townsend achieved at least 80% of both the revenue and earnings targets. Respondent was to determine whether the revenue and earnings targets had been met, petitioners could object to its calculations, and the matter could then be submitted to arbitration if the parties could not resolve their differences.

¶ 5 On February 20, 2008, Mario Perez, an employee of respondent, provided Walkenshaw with a summary of respondent's unaudited calculations of Aspen-Townsend's 2007 performance indicating that it made $8.25 million in revenue and $773,000 in earnings that year. Perez related that the audit should be complete in two weeks and that he did not think it would result in any significant changes to the figures. On April 28, 2008, Walkenshaw asked Perez if there had been any developments regarding the audit, and Perez responded that Aspen-Townsend had reported $8.25 million in revenue and $773,000 in earnings for 2007 and that earnings had

therefore fallen short of the target by about $530,000. Walkenshaw asked Perez for more detailed information regarding respondent's calculation of the 2007 revenue and earnings, and Perez provided him with that information. On May 27, 2008, Walkenshaw provided respondent with numerous objections to its calculations, and the parties subsequently entered into arbitration before Ronald Cote of Grant Thornton LLP.

¶ 6 Petitioners submitted a position paper to the arbitrator in which they asserted that they were entitled to the full deferred consideration and that respondent had failed to follow generally accepted accounting principles in calculating Aspen-Townsend's 2007 revenue and earnings. Petitioners further asserted that respondent had undercounted revenue by at least $428,000 and overcharged expenses by at least $158,000. Respondent asserted in its response that its financial statements were in conformity with generally accepted accounting principles and that petitioners were not entitled to any deferred consideration.

¶ 7 On May 19, 2010, the arbitrator issued a decision and award in which he determined that Aspen-Townsend's performance in 2007 resulted in $8,721,522 in revenue and $944,417.42 in earnings and concluded that petitioners were not entitled to any deferred consideration because Aspen-Townsend did not achieve at least 80% of the earnings target. In doing so, the arbitrator increased the revenue total calculated by respondent by $318,572 for Townsend's work in progress at the end of 2006 and by $152,950 for work performed by Aspen-Townsend employees for respondent's clients. The arbitrator also increased the operating expenses calculated by respondent by $189,428 for employee benefits costs and reduced those operating expenses by $44,132.40 for numerous reasons, including a $2,614.35 reduction for travel

expenses.

¶ 8 On May 24, 2010, petitioners submitted a request for corrections to the arbitration award to the arbitrator in which they asserted that he had improperly subtracted $189,428 in employee benefits costs from Aspen-Townsend's 2007 earnings. Petitioners maintained that the issue of additional employee benefits costs was not subject to arbitration because there was no dispute as to such costs. On June 2, 2010, respondent submitted a letter to the arbitrator in which it asserted that the arbitrator did not have the authority to modify the award and that the issue of employee benefits costs was properly a proper matter of arbitration. On July 7, 2010, the arbitrator sent a letter to the parties relating that he had determined that he did not have the authority to reconsider the arbitration award and noted that the issue of employee benefits costs was within the scope of the arbitration because petitioners had requested that he "determine the types of adjustments that are necessary" in their position paper.

¶ 9 On August 16, 2010, petitioners filed an application to modify or, in the alternative, to vacate the arbitration award with the circuit court in which they asserted that the arbitrator had exceeded his authority by subtracting $189,428 in employee benefits costs from Aspen-Townsend's 2007 earnings where that issue was not subject to arbitration. Respondent then filed a crosspetition to confirm the award in which it asserted that the asset purchase agreement did not limit the issues that could be considered by the arbitrator, petitioners were bound to accept the arbitrator's interpretation of the purchase agreement, petitioners had waived its challenge or were estopped from asserting it because they had raised new issues during the arbitration, and the issue of additional employee benefits costs had been disputed before the arbitration.

¶ 10 On February 8, 2011, the circuit court entered an order denying petitioners' application to modify or vacate the arbitration award and granting respondent's crosspetition to confirm the award. In doing so, the court concluded that the arbitrator had not exceeded his authority in issuing the arbitration award and found that the arbitrator was not prohibited by section 2(g) of the purchase agreement from considering employee benefits costs in deciding whether petitioners were entitled to deferred consideration. The court also found that petitioners had allowed for the review such costs in their position paper, that they had benefitted from the arbitrator's consideration of an issue that had not been raised prior to arbitration, and that the issue of employee benefits costs was in dispute prior to arbitration.

¶ 11 ANALYSIS

¶ 12 Petitioners contend on appeal that the circuit court erred by denying their application to modify or vacate the arbitration award where the arbitrator exceeded his authority by considering employee benefits costs that were not at issue in issuing his decision and award. Initially, the parties disagree over the standard of review that should be applied in this case. An arbitrator's decision on the arbitrability of an issue will be reviewed *de novo* unless the parties have agreed to submit the question of arbitrability to arbitration, in which case the arbitrator's decision will be accorded substantial deference. *Salsitz v. Kreiss*, 198 Ill. 2d 1, 13-14 (2001). A court will not assume the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. *Id.* at 15.

¶ 13 Respondent asserts that the arbitrator's determination regarding the arbitrability of the employee costs benefits issue is entitled to substantial deference because the parties had agreed

to submit the issue of arbitrability to the arbitrator in their engagement letter. In doing so, respondent quotes the portion of the engagement letter relating that the parties "understand and agree that [the arbitrator's] interpretation and application of terms of the [purchase agreement], including (if applicable) but not limited to [section 2(g)], will be based on his judgment and on his expertise as an accountant and business advisor." Respondent also cites to the portion of the engagement letter providing that the arbitrator's decision shall be final and binding and maintains that the parties thus bound themselves to accept the arbitrator's interpretation of the arbitration clause in the engagement letter.

¶ 14 We determine, however, that the quoted portion of the engagement letter does not charge the arbitrator with the responsibility of determining whether certain issues are arbitrable, but merely relates that the arbitrator will employ his judgment and expertise when interpreting and applying the relevant terms of the purchase agreement. As such, we conclude that the parties did not agree to submit the question of arbitrability to the arbitrator and that the arbitrator's resolution of the issue must therefore be reviewed *de novo*. *Id.* at 13.

¶ 15 Petitioners assert that the arbitrator was not authorized to consider the employee benefits costs at issue in rendering the arbitration award because that issue was not a "remaining dispute" under section 2(g) of the asset purchase agreement. Section 2(g) provides that respondent was responsible for determining whether the 2007 earnings and revenue targets had been met based on its 2007 audited financial reports. Petitioners then had 30 days to submit any objections regarding those calculations to respondent, and if petitioners and respondent could not resolve "any such disputes" within 14 business days, "any remaining disputes" would be resolved by

arbitration. Thus, petitioners maintain that section 2(g) directs that the only issues that may be resolved by arbitration are "any remaining disputes" that had been raised in their objections to respondent's calculation and had not since been resolved. Petitioners further maintain that since they did not object to respondent's calculations on the basis that employee benefits costs were undercounted, that issue was never disputed and therefore could not be a "remaining dispute" that could be resolved by arbitration.

¶ 16 However, section 2(g) also provides that the arbitrator "will prepare a written report to both parties which shall set forth [his] final determination of the Deferred Consideration, and will submit a proposed resolution of such unresolved disputes." Section 2(g) further provides that the arbitrator's "determination of the Deferred Consideration will be final and binding" upon the parties. Thus, the plain language of section 2(g) requires the arbitrator to determine whether petitioners were entitled to deferred consideration in addition to resolving any other unresolved disputes arising from petitioners' objections to respondent's calculations. As such, we determine that the issue of whether petitioners were entitled to deferred consideration was a matter in dispute before the arbitrator in this case.

¶ 17 This court will presume that the parties to an arbitration proceeding intended that all matters in dispute be decided by the arbitrator (*Richter v. Western States Insurance Co.*, 264 Ill. App. 3d 230, 232 (1994)) and that all issues of law or fact that are necessary to the resolution of the dispute are within the authority of the arbitrator (*Hollister Inc. v. Abbott Laboratories*, 170 Ill. App. 3d 1051, 1060-61 (1988)). In this case, the arbitrator was charged with determining whether petitioners were entitled to deferred consideration and therefore had the authority to

consider all matters necessary to determine whether petitioners were entitled to such consideration. In order to determine whether petitioners had met the earnings target for 2007, the arbitrator was required to subtract operating expenses, such as those for employee benefits costs, from revenues. As such, the arbitrator did not exceed his authority by considering the employee benefits costs at issue in determining whether petitioners were entitled to deferred consideration, and we therefore conclude that the circuit court did not err by denying petitioners' application to modify or vacate the arbitration award and granting respondent's crosspetition to confirm the award.

¶ 18 Having concluded that the arbitrator was authorized by section 2(g) of the parties' asset purchase agreement to consider the employee benefits costs at issue in issuing his decision and award, we need not consider the additional issues raised by the parties in their briefs.

¶ 19 CONCLUSION

¶ 20 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.