

Minkowitz v. Israeli (A-2335-11T2)

The New Jersey Appellate Division has held that an individual retained to serve as an arbitrator cannot act as a mediator and then return to the role of arbitrator.

The Appellate Division has held that when parties to a dispute elect to submit a matter to binding arbitration, an arbitrator may not initially act as a mediator and then return to the role of an arbitrator unless the parties agree in writing to allow that individual to serve in that dual role. In this case, the court held:

mediation, although a form of Alternative Dispute Resolution, differs from binding arbitration... We conclude the differences in the roles of these two types of dispute resolution professionals necessitate that a mediator, who may become privy to party confidence in guiding disputants to a mediated resolution, cannot thereafter retain the appearance of a neutral fact finder necessary to conduct a binding arbitration proceeding. Consequently, absent the parties' agreement, an arbitrator appointed under the [Uniform Arbitration Act] may not assume the role of mediator and, thereafter, resume the role of arbitrator.

In Minkowitz v. Israeli, the plaintiff filed for divorce from her husband of 14 years. Following the filing of the divorce proceedings, the parties agreed to decide financial issues via binding arbitration and agreed that all custody and parenting plan issues would be reviewed in nonbinding arbitration. The parties agreed to engage a single arbitrator and a jointly chosen forensic accountant. To memorialize this understanding, the parties entered into a written arbitration agreement setting forth the issues to be presented to the arbitrator, which decisions of the arbitrator would be binding, which decisions would be non-binding and the scope of the arbitrator's powers. Further, the arbitration agreement noted that any person participating in the arbitration would "have the right to be provided copies of all documents presented to the arbitrator."

Initially, the arbitrator met with both parties prior to the commencement of arbitration hearings. The parties at that point decided to engage in settlement discussions and mediation in an attempt to narrow issues for final determination. During the mediation process, the parties relied on the jointly chosen forensic accountant to offer recommendations regarding resolution of certain financial issues. If the parties accepted the recommendation, a written agreement would be prepared regarding specific issues.

Through this process, the parties were successful in resolving a number of issues. The resolution of these issues resulted in four separate "settlement" agreements which were entered into during 2009 and memorialized in writing. One of these agreements noted that its contents had been

reached “between the parties...after mediation with the assistance of the arbitrator and financial adviser.” In these agreements, the parties agreed to such issues as waiving the rights to one another’s medical practice and respective claims for equitable distribution. After the four agreements were reached by the parties, but before specific terms were formalized, plaintiff hired co-counsel to assist in finalizing a Property Settlement Agreement. In doing so, co-counsel requested a meeting with the forensic accountant to review his findings which served as the underpinnings of the parties’ previous agreements relating to the property settlement. The defendant objected, claiming that all of these matters were settled and disclosure was not necessary. This in turn resulted in a flurry of letters to the accountant and arbitrator.

The arbitrator denied plaintiff’s request to meet with the forensic accountant and/or review his records. At this point, plaintiff’s original counsel filed an application with the Family Part to be relieved and substitute co-counsel as plaintiff’s attorney of record. Plaintiff’s new counsel then moved before the family part for an Order requiring the forensic accountant to produce all evaluations of the parties’ finances. The Family Part denied this motion stating that the parties had agreed that all financial aspects would be subject to binding arbitration. Plaintiff then filed a motion with the arbitrator seeking his recusal or alternatively requesting the production of the forensic accountant’s financial documents. In that motion, plaintiff’s counsel inferred bias by noting that the arbitrator had served both as a mediator and arbitrator throughout the proceeding. Defendant opposed plaintiff’s request and sought attorney’s fees. In rendering his decision, the arbitrator noted that “my role was to make recommendations, when requested, on the various financial issues...at no time did I assume the role of mediator. I did not participate in the discussions of the financial information.” The arbitrator subsequently rejected plaintiff’s request for releasing the financial documents she sought. Plaintiff then returned to the Family Part seeking to reverse the arbitrator’s refusal to disclose the records sought. This motion was denied by the trial court.

The parties then returned to arbitration hearings. During these proceedings, the defendant requested certain relief from child support which plaintiff objected to. The arbitration hearing was conducted and was adjourned pending additional submissions by the parties. The arbitrator rendered an award with regard to outstanding issues pertaining to the parties and on March 17, 2011, issued an order incorporating the parties’ 2009 settlement agreements, forensic accountant’s spreadsheets calculating debts and credits, the income schedules the forensic account prepared supporting the calculation of child support, and his decisions following the hearing.

Plaintiff continued to seek to have the 2009 agreements vacated along with the other arbitration orders. To do so, Plaintiff submitted to the arbitrator a certification of the defendant’s ex-fiancée which stated that the forensic accountant was biased against the plaintiff. In the certification, the ex-fiancée claimed that she had been told by the defendant that the accountant “was going to make sure that everything was taken care of...a little birdie told me [the forensic accountant] got it covered.” Additionally, the certification provided that the defendant had significantly underreported his income. The defendant opposed the application and cross-moved for attorney’s fees. The arbitrator found that the ex-fiancée was not “completely objective” and that the forensic accountant had acted in a neutral capacity throughout the proceedings. The arbitrator rejected plaintiff’s request for vacating the 2009 orders and other arbitration decisions

and reserved on defendant's fee requests. Ultimately, the arbitrator issued an award finding that the plaintiff was responsible for certain attorney fees incurred by the defendant following the last 2009 agreement.

The defendant then moved in the Family Part to confirm the arbitration award. Plaintiff cross-moved to vacate the award and all underlying agreements that were incorporated therein. The plaintiff further sought to terminate the services of the arbitrator and forensic accountant, to reopen discovery and to select a new arbitrator and expert. The trial court granted defendant's motion to confirm the award and denied the plaintiff's cross-motion. The court did however deny defendant's request for enforcing the arbitrator's award allocating attorney's fees. Plaintiff then appealed the trial court's decision.

In rendering its decision, the Appellate Division noted that neither party to the action contested the consensual agreement to submit all financial disputes to binding arbitration. In fact, the court found that as arbitration is a "creature of contract", it is permissible for parties to an action to select which aspects of the action shall be arbitrated. The court further noted that the Uniform Arbitration Act allows parties to define arbitration proceedings and the methods in which they are to be conducted.

The court emphasized that, "when binding arbitration is contracted for by litigants, the judiciary's role to determine the substantive matter subject to the arbitration ends. Arbitration should spell litigation's conclusion, rather than it's beginning." Once binding arbitration is selected, the court's powers are generally limited to: enforcing orders or subpoenas issued by the arbitrator, confirming an arbitration award, correcting or modifying an award and in very limited circumstances, vacating an award. Further, the court noted that an arbitration award can only be vacated upon proof that the award was procured through corruption, fraud or undue means, partiality of the arbitrator which results in prejudicing the rights of a party to the arbitration proceedings, the arbitrator refusing to postpone a hearing or refusing to consider evidence of material to the controversy which prejudices the rights of the party, and the arbitrator exceeding his powers.

Importantly, the court recognized that while the scope of review of an arbitration award is limited by the Arbitration Act, the parties can contractually agree to expand judicial review. The court noted that: "for those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court...the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that...awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that."

In this case, plaintiff alleged that due to the arbitrator acting as a mediator, all of the "settlement" agreements reached by the parties and subsequent arbitration decisions should be vacated. With regard to the instant case, the court found that, "this case unraveled because the parties agreed to arbitration, then chose to do something else." While it is not improper to engage in settlement discussions when agreeing to arbitration, the potential problem arises when the arbitrator acts as a mediator. In rendering its decision, the court focuses on the difference between a mediator and an arbitrator. Specifically, the court notes that a mediator, in order to attempt to facilitate a

resolution to a case, will seek confidential information from the parties and attempt to use that information to “push” the parties towards settlement. Once a mediator undertakes this role, it is impossible for that individual to be a neutral fact finder which is essential to conducting a binding arbitration. Accordingly, the court found that an individual serving in both capacities create inherent problems. Regardless, the court held that parties may enter into an agreement whereby an arbitrator may assume the role of a mediator and thereafter resume the role of an arbitrator. However, absent such agreement, “an arbitrator under the act may not assume the role of mediator and, thereafter, resume the role of arbitrator.”

Ultimately, in this case, the court found that the arbitrator engaged in mediation in seeking to obtain settlement agreements reached in 2009. Further, the court found that parties entered into subsequent agreements between arbitration hearings. Ultimately, the court found those “settlement” agreements entered into by the parties enforceable. However, those orders/decisions entered by the arbitrator after he engaged the parties as a mediator were not enforceable.

The court reflected that arbitration, particularly binding arbitration, must be purposefully chosen, and the parameters must be designated in a contract between the parties. “If binding arbitration is selected as the forum for resolution disputes, a litigant cannot jump back and forth between the court and the arbitral forum. By its very nature, arbitration does not permit such a hybrid system...the parties held in mistaken belief that court intervention was permitted to check the decisions of the arbitrator. This is untenable.” The court continued “The Act’s provisions are unmistakable: once binding arbitration is chosen and the arbitrator is named, the court is no longer involved in reviewing or determining the substantive issues.”

Accordingly, the court found that the 2009 agreements and other agreements reached thereafter by the parties were enforceable. However, the court found that decisions rendered by the arbitrator after he assumed the role of the mediator were not enforceable and were vacated. Additionally, the court ordered the new arbitrator to request for documents in light of the agreement to arbitrate. The court, in turn, vacated those orders of the arbitrator and remanded the case for new arbitration proceedings before a new arbitrator.