

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - GLOUCESTER COUNTY
DOCKET NO. L-473-04

MAX ZWEIZIG, :
Plaintiff :
vs. : STENOGRAPHIC TRANSCRIPT OF
TIMOTHY ROTE, et als, : MOTION HEARING
Defendants :

DATE: March 3, 2006
PLACE: Gloucester County Courthouse
1 North Broad Street
Woodbury, NJ 08096

B E F O R E:
THE HONORABLE ANNE McDONNELL, PJCv.

TRANSCRIPT ORDERED BY:
SAMUEL J. MYLES, ESQUIRE
(Holston MacDonald Uzdavinis Eastlack Ziegler & Lodge)

A P P E A R A N C E S:
KEVIN M. COSTELLO, ESQUIRE (Levow & Costello)
Attorney for Plaintiff
RONALD J. UZDAVINIS, ESQUIRE
(Holston MacDonald Uzdavinis Eastlack Ziegler)
Attorney for Defendants

Reported by:
Zellie J. Pierre, CSR
Official Court Reporter
Gloucester County Courthouse
1 North Broad Street
Woodbury, NJ 08096

1 THE COURT: Zweizig versus Rote, come forward
2 please, motions 10 and 11.

3 Counsel, appearances. For the plaintiff.

4 MR. COSTELLO: Good morning. Kevin Costello,
5 from Levow and Costello, on behalf of plaintiff, Max
6 Zweizig.

7 MR. UZDAVINIS: Your Honor please, Ronald
8 Uzdavinis, Holston, MacDonald, Uzdavinis, Eastlack,
9 Ziegler law firm, representing defendants.

10 THE COURT: Motion number 10 is the
11 plaintiff's motion for leave to file an amended
12 complaint. Motion 11 is the plaintiff's motion for
13 reconsideration. I'll hear you, Mr. Costello.

14 MR. COSTELLO: Judge, I would suggest we
15 address the issue of reconsideration first. It's my
16 perception that may affect the ability of the Court to
17 render a decision on the second.

18 Your Honor, you will recall that we were
19 before you several weeks ago on the question of the
20 enforceability of the arbitration agreement, mediation
21 agreement in this matter.

22 We filed our motion for reconsideration in
23 part based upon the Court's invitation at the end of
24 the transcript to do so, if we thought the Court had
25 missed anything.

1 As part of our motion package we hope we
2 pointed out that the Court may have missed a few
3 things, one of the most noteworthy being that your
4 Honor had expressed in 2 locations in your commentary
5 from the bench the concern that the arbitrator under
6 Oregon's rules would have the capacity to shift back
7 half of the costs of the arbitration, not the
8 attorney's fees and the underlying matter, but the
9 arbitration costs themselves to Mr. Rote from
10 Mr. Zweizig, in the event that Mr. Zweizig was a
11 prevailing party, and you had expressed this concern
12 because, of course, under New Jersey law such could not
13 be.

14 The enforceability of the agreement, to the
15 extent that it did not provide for the defendant to
16 bear the cost, would be unenforceable.

17 I have looked at the rules very specifically,
18 cause counsel and I could not answer that concern of
19 your Honor at the time, and the rules very clearly
20 state that at best it is the discretion of the
21 arbitrator to shift the costs of the arbitration back
22 to Mr. Rote, in the event only that Mr. Zweizig is the
23 prevailing party.

24 Now, as to the attorney's fees question, I
25 can candidly agree with my counterpart that under

1 Oregon's whistle blower law it does appear that counsel
2 fees are as mandatory.

3 The language, of course, is not identical,
4 but a fair reading of it is that the counsel fees and
5 their version of CEPA are an inevitability for a
6 prevailing party, so the question really becomes to the
7 extent that your Honor is unpersuaded by our argument
8 that the Court may have misinterpreted Garfinkel and
9 the rest of the New Jersey precedent on the issue of
10 the initial unenforceability of the agreement, based
11 upon statute concerns, discovery concerns and costs,
12 moving past that, the Court is not going to change its
13 mind in that regard, Mr. -- we laid out in our letter
14 brief the fact that the costs of the arbitrator,
15 apparently it's a panel that they create, the costs are
16 significant.

17 They require deposits. They require sort of
18 forfeitures of certain fees in the event that things
19 are canceled at the last minute and, obviously, the
20 costs are going to be significant, and in the end, if
21 Mr. Zweizig in good faith brings this action and loses,
22 then he's borne all those costs, which effectively
23 means he can't try the action in good faith at all
24 under the possibility that he may lose cause he doesn't
25 have those funds, and then, secondly, even if he wins

1 it may end up being a pyrrhic victory if the costs of
2 the arbitration, his half of it, are so substantial
3 that they outweigh, off-set or eliminate whatever he
4 receives under the underlying whistle blower action,
5 you know, and whatever the math works out to be, so
6 your concerns as expressed have now been answered.

7 The arbitrator is not compelled to shift the
8 cost back. It is only discretionary. I submit to you
9 that that renders the agreement unenforceable and that
10 the Court should reconsider its decision.

11 THE COURT: Thank you. Mr. Uzdavinis.

12 MR. UZDAVINIS: Your Honor please, I
13 respectfully disagree. Mr. Costello is certainly
14 correct about what the rules are in Oregon. I think
15 what's very interesting, though, your Honor, is to note
16 that this agreement, as your Honor noted I think during
17 the course of the determination, is negotiated over a
18 4 month period.

19 Various clauses were changed at Mr. Zweizig's
20 request or insistence, and over that more than 4 month
21 period, your Honor, the only clauses which were not
22 disturbed were those related to arbitration and
23 mediation.

24 Mr. Zweizig is an I.T. Professional, your
25 Honor. Mr. Costello's moving papers here certify that

1 the place that he found the Oregon rules of arbitration
2 was on-line.

3 I don't think there's any question but that
4 if Mr. Zweizig either had second thoughts about whether
5 this should be arbitrated or what the terms of
6 arbitration would be, it would be very simple or would
7 have been very simple for him to go on-line, and as far
8 as the affordability of arbitration is concerned, I
9 don't remember seeing any case anywhere at any time
10 indicative of the fact that if a person cannot afford
11 arbitration, therefore an arbitration clause is
12 unenforceable, and, by the way, I don't recall seeing
13 any certification from Mr. Zweizig indicating that he
14 couldn't afford arbitration; simply that, perhaps,
15 according to his attorney, he would rather not pay
16 those expenses, especially if a determination is made
17 against him.

18 The discretion of an arbitrator to award or
19 not award fees or costs is something which this Court
20 cannot take away from that arbitrator. It is something
21 that was agreed to basically by the parties at the time
22 that they entered into the contract and that shouldn't
23 be disturbed.

24 Your Honor called it right the first time. I
25 respectfully suggest that you do not reconsider.

Colloquy

7

1 MR. COSTELLO: Your Honor, if I may?

2 THE COURT: Yes.

3 MR. COSTELLO: We have a significant
4 disagreement about the -- and to the extent that this
5 was important to your Honor at all in rendering your
6 initial decision, I don't recall that it was. I recall
7 that it was a subject of commentary by you. I don't
8 know how important it was to you.

9 There is a significant dispute as to what
10 "negotiation" quote, unquote, took place. We supplied
11 an affidavit of Mr. Zweizig which lays out that
12 dispute. We've also had him in other motion practice
13 in this case, prior to this, set forth the same
14 position.

15 This is a situation where if a fact finder or
16 the Court sitting in an evidentiary hearing capacity
17 listens to Mr. Zweizig's version of the origination of
18 the agreement, and Mr. Rote's version of the
19 origination of the agreement, there are going to be 2
20 very different stories, and only Mr. Rote has something
21 involving 4 months.

22 Mr. Zweizig's story will not involve the
23 sophistication that it takes to be able to find rules
24 of enforceability on-line and understand them as a
25 lawyer does, and, by the way, I like to think I'm not a

1 dummy, but it took me some time to ferret through those
2 rules and understand how one rule implicates another
3 and how another rule interacts with another, but aside
4 from that there was no negotiation.

5 This was a situation Mr. Zweizig was rushed,
6 harried, and presented with the terms. There was some
7 handwritten additions and corrections, and if your
8 Honor thinks back to all the years you practiced and
9 everyone practices, when there's real negotiations
10 between parties of equal bargaining strength you
11 redraft stuff, you know, you have more than one draft.

12 You have lawyers counterproposing formats for
13 agreements and then eventually everyone reaches one
14 that's mutually satisfactory. You don't jot it down in
15 crayon, you know, or pencil or pen on margins and then
16 say, okay, that's good enough.

17 THE COURT: . Actually, some of my clients did
18 that.

19 MR. COSTELLO: Well, yeah, but you don't let
20 them get away with that.

21 THE COURT: Placemats.

22 MR. COSTELLO: When my clients do that in
23 crayon, Judge, I usually have to reexamine my
24 representation, but this is a situation that belies
25 haste and belies an unequal bargaining position, so

1 that issue, to the extent that you're considering it of
2 relevance to any issue, is disputed.

3 The other issue we just talked about is the
4 fact that Mr. Zweizig has certified or affidavited it,
5 that if he has to undergo even a good faith attempt to
6 win, and hope that if he wins the cost will be shifted
7 back, it's going to break him, and I submit to your
8 Honor that no matter what your Honor's reading of the
9 American Arbitration Act, no matter what New Jersey's
10 law might be, no matter what anyone ever says
11 arbitration is supposed to represent, if the effect of
12 Court holdings is that, well, we're going to enforce
13 these things in such a way that the average person
14 simply can't afford to try their luck, the doctrine's
15 got to go.

16 We have to reexamine the whole kettle of fish
17 because that cannot be the way people are shunted out
18 of the courtroom into private arbitration and then
19 basically told in private arbitration, oh, you can't
20 afford it, you're not wealthy, I guess you can't try
21 your case. It can't be the law.

22 THE COURT: All right. Let me just ask, the
23 provision, and this is a 9 page agreement and I think
24 one of you pointed out 4 pages have to do with
25 mediation, arbitration.

1 My reading of the agreement is that it's a 2
2 step process. If you choose the mediation it's at no
3 administrative cost to the employee. Is that your
4 reading?

5 MR. UZDAVINIS: That's correct, your Honor,
6 and that mediation took place, as you may recall, with
7 your Honor's request and blessing several months ago,
8 so now we have arbitration.

9 THE COURT: Oh, okay. I did not recall. All
10 right. In any event, with respect to the agreement, I
11 did not consider the length of time the parties
12 negotiated, but, rather, the agreement, itself. It is
13 marked up and changed in certain ways.

14 For instance, there was a representation that
15 the employee agrees that the time, territory, and scope
16 restrictions set forth are fair and reasonable for the
17 protection of the company's interest, and the employee
18 further agrees that his compliance with the
19 restrictions will not prevent him from pursuing his
20 livelihood, and that is stricken out in its entirety,
21 initialed, and then there's a section on injunctive
22 relief, where all the shall's are crossed out and may's
23 are inserted and the employee, instead of agrees,
24 understands is inserted. So, it appears, at least,
25 that the agreement was reviewed and read.

1 I always have concerns about arbitration and
2 its efficiency and effectiveness and its cost, most
3 usually in the context of new home warranty cases, but
4 I'm satisfied that this agreement sets forth a valid
5 mediation arbitration provision and I deny the request
6 for reconsideration and that, I think we all agree,
7 makes the other motion moot, so I won't deny it as
8 moot.

9 MR. UZDAVINIS: Thank you, your Honor.

10 MR. COSTELLO: I think the effect of your
11 decision is to dismiss. I guess we have to figure out
12 if it's -- I assume it's with prejudice, but I would
13 prefer that if your Honor phrase it without prejudice
14 because we simply don't know what the procedural effect
15 of the next steps are going to be, and for that reason
16 I would ask also that in addition to putting without
17 prejudice, that you certify your order as final for
18 purposes of appeal.

19 THE COURT: Generally when I dismiss a case
20 and refer it to -- because of an arbitration clause it
21 is without prejudice and it is a final order.

22 MR. COSTELLO: It disposes of all issues, at
23 least pending the appeal process. Thank you, Judge.

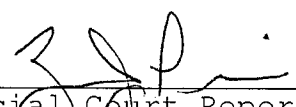
24 (Hearing concluded.)

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

I, Zellie Pierre, C.S.R., License Number XI01064, an
Official Court Reporter in and for the State of New
Jersey, do hereby certify the foregoing to be prepared
in full compliance with the current Transcript Format
for Judicial Proceedings and is a true and accurate
non-compressed transcript to the best of my knowledge
and ability.



Official Court Reporter
Criminal Justice Complex
Woodbury, New Jersey 08096

1-3-07
DATE