

2 SUPREME COURT OF THE STATE OF NEW YORK
3 COUNTY OF NEW YORK: CIVIL TERM : PART 48

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4 SPACE RACE, LLC,

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Petitioner,

6

-against-

Index No.
655649/2018

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8 ALABAMA SPACE CENTER SCIENCE EXHIBIT
9 COMMISSION D/B/A U.S. SPACE & ROCKET
10 CENTER,

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Respondent.

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Transcript of Decision

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New York Supreme Court
60 Centre Street
New York, New York 10007
March 8, 2019

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B E F O R E:

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HON. ANDREA MASLEY, Justice of the Supreme Court

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A P P E A R A N C E S:

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BY: JOHN H. MINTZ, ESQ.

WILLIAM R. LUNSFORD, ESQ.

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LAURA L. LUDOVICO
Senior Court Reporter
60 Centre Street - Room 420
New York, New York 10007

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2 THE COURT: Good morning, everyone. Welcome
3 back.

4 MR. KENNEDY: Good morning. Thank you, Your
5 Honor.

6 MR. LUNSFORD: Good morning.

7 THE COURT: Okay. Let's see who's here for Space
8 Race.

9 MR. KENNEDY: For Space Race, James Kennedy of
10 Kennedy Berg. I'm accompanied by Meital Waibsnaider and by
11 Gabriel Berg, who has just arrived back from Los Angeles,
12 so I'm going to take the laboring order this morning, Your
13 Honor.

14 THE COURT: Okay. And for Alabama Space Science
15 Exhibit Commission?

16 MR. HINTZ: John Hintz of Maynard Cooper & Gale.
17 With me is my partner William Lunsford of Maynard Copper &
18 Gale, who will be arguing today, Your Honor.

19 THE COURT: Okay. While we're on for a
20 preliminary injunction motion regarding -- and also a
21 cross-motion to stay, I'm actually going to render a
22 decision from the bench on the original petition.

23 So I really prefer writing decisions, but I think
24 that it's important to get this done. I'll do my best to
25 keep this organized. For the following reasons the
26 petition is granted:

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The November 13, 2018 AAA arbitration award for \$1,365,582 is granted with statutory interest from November 13, 2018 until satisfied. Here's the reasoning.

We have a June 1, 2016 contract with a three-year term. Plaintiffs -- I'm saying plaintiffs, it's really petitioner. I'll use them interchangeably. Space Race, the petitioner, filed its AAA demand on December 28, 2017. There was a decision November 9, 2018. There was a hearing from July 23 through the 26th, 2018.

The petitioner filed this petition to confirm the award and the respondent moved for dismissal. They did not move to vacate the award. And one of the bases for this decision is that a failure to seek vacatur when I have a petition to confirm is actually fatal under *Cullen v. Paine, Webber, 863 F.2d 851*. But that's really not the main reason.

Let me just note that the Court is aware that the respondent did file an action in Alabama on February 13, 2019 to vacate the arbitration award. The Court notes that this action was first filed, and it rejects the respondents' argument that the action filed in Alabama was first filed.

Okay. The Arbitration Agreement specifies Alabama Law will apply. However, this is not dispositive to the forum selection. In fact, there is no forum

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2 selected, it's simply AAA. That is not dispositive. The
3 Court relies on *Merrill Lynch v. McLeod*, 208 A.D.2d 81
4 (*First Dep't. 1995*). So, as I said, it didn't actually
5 specify where. There was no forum selection provision,
6 only that Alabama Law would apply. And, in fact, the
7 arbitration panel did apply Alabama Law.

8 The primary reason for this decision is that the
9 respondent is not an agency of the State of Alabama.
10 That's not my finding, that is the finding of three other
11 courts in the *Odysseia*, *Parker* and -- two *Odysseia*
12 decisions and the *Parker* decision.

13 And I might also add that there's a Florida Court
14 that's relying on those decisions in the same way. That's
15 *Odysseia*, O-D-Y-S-S-E-I-A. And the Florida case is *Castro*
16 *v. Kentucky Higher Education Student Loan Corporation*, 2017
17 U.S. Dist. LEXIS 20600. The *Odysseia* decisions are
18 interpreted the same way. Okay. So that's that.

19 Now, the respondent relies on the case from the
20 Supreme Court of Alabama that the respondent calls *Ingalls*.
21 Here in New York we would say the plaintiff first, which is
22 *Barnhart v. Ingalls*, which is dated -- it's cited
23 throughout the parties' papers. The respondents are
24 relying on page one, line two, the introductory sentence to
25 this decision. However, respondent was not a party to the
26 action and whether it is an arm of the government or a

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2 government agency was not an issue in the case, and
3 therefore, it is really dicta, even though the opening
4 sentence to this decision -- okay.

5 So the respondent argues that it has no
6 connection to New York, but, in fact, it participated in
7 the arbitration here. It did raise this issue of
8 jurisdiction and sovereign immunity. However, the attorney
9 waived it on the record. Now the respondent is saying that
10 it can't waive, but that brings me back to the finding that
11 they are not a government agency.

12 And let me just go through the factors for that.
13 So the respondent hires its own personnel, it raises and
14 spends money, it owns property, including the space center,
15 it can sue and be sued, it can have its own counsel, it's
16 not limited to representation by the State Attorney
17 General's Office, although I understand you are standing in
18 the shoes of the attorney general today. So I would say it
19 operates more like a private public corporation.

20 And, in fact, this transaction couldn't be more
21 of a commercial transaction where it was paying the cost of
22 making a children's program about space and NASA and the
23 parties designated AAA. There's nothing in the record to
24 say that there's even a AAA in Alabama. So to the extent
25 that the respondent didn't think that it could be appearing
26 in a New York court, it certainly wasn't going to be

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appearing in an Alabama arbitration. In fact, the
petition -- the respondent asked for the location to be
moved. It asked for Huntsville, Alabama and Washington,
DC.

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With regard to the fact that this really is as
commercial agreement as you can get, in its papers the
respondent says that while it could select arbitration
under the Arbitration Agreement, even though it says the
agreement says arbitration, the petitioner in my action,
Space Race, could not choose arbitration, rather,
regardless of the agreement, it only has one place to go
and that is a -- hold on -- something that is similar to
our Court of Claims here in New York.

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MR. LUNSFORD: Your Honor, are you referring to
Board of Adjustment?

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THE COURT: Board of Adjustment. Thank you so
much.

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So that just wasn't the bargain that the parties
reached.

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Just back to the agreement, which is really so
apparently a commercial transaction. The arbitration award
says that the Respondent entered into a NASA grant and
Cooperative Agreement effective February 2, 2016, pursuant
to which NASA was to provide funding to the respondent,
which in turn was to disburse the funding to Space Race.

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Respondent acted as an intermediary due to NASA's requirement that funding be granted directly only to nonprofit entities. So the arbitration panel found that the respondent essentially functioned as a pass-through entity.

Pursuant to that agreement, in 2016 and 2017 respondent paid petitioner \$3 million of the \$4,313,902 invoiced. Let me put the provision that we're talking about on the record. Section five of the agreement provides that "In the event of a dispute, the parties shall first attempt to resolve said dispute in good faith between them and then attempt to resolve by mediation. And if the parties still cannot resolve any such dispute, it shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, provided that the parties shall be entitled to bring an action in a court of competent jurisdiction for injunctive or other provisional relief in aid of such arbitration for or to compel compliance with this agreement." And here we are.

Now, the issue of, as I said, the proper location of the hearing was addressed in the arbitration or by the panel. And it's also relevant to this decision that the respondent participated in arbitration and made appearances here in this action without -- I believe I'm the one who

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brought up the idea of making a special appearance for the purpose of jurisdiction. Otherwise, the respondent has asked this Court for relief and even today counsel did not make a special appearance for the purposes of what was to be an injunction -- an argument on an injunction.

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There are four grounds under CPLR 7511, and these are not -- I am actually limited to these grounds in reviewing and deciding whether to grant the relief requested. Contrary to -- actually, both parties put a lot of review of the underlying facts that were before the arbitration panel, but that's not my job, to be second guessing what they did. I am limited to whether the arbitrator exceeded their power, whether the award violates a strong public policy, was irrational, exceeds a specifically enumerated limitation in the arbitrator's power. So that's CPLR 7511.

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Also, the Federal Arbitration Act applies. The elements under the FAA, §10(a), are whether the award was procured by corruption, fraud or undue means, whether there was partiality or corruption in the arbitrators; three, the arbitrators were guilty of misconduct in refusing to postpone a hearing or refusing to hear evidence, and whether the arbitrators exceeded their powers. None of those elements under the CPLR or the FAA are actually asserted.

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With regard to respondent's waiver at the arbitration, it's in the transcript, pages 574 to 575, that respondent said it was not and would not be asserting sovereign immunity and so all of the parties went ahead and had the arbitration. Now, this was really a significant waiver because the petitioners and the arbitrators relied on it. They spent an awful lot of time at the hearing, which was, I think, four days.

But more importantly, as a result of having the arbitration, even if you look at this petition to confirm as expedited, the statute of limitations has run and now the petitioners have been negatively affected and prejudiced by this decision to say that the sovereign immunity defense was waived.

Under the FAA, 9 U.S.C., §2, the Arbitration Agreement is irrevocable and enforceable. And while the FAA does provide deadlines, it does not require a party to wait before seeking to confirm. So this agreement, which, as I said, was clearly a commercial agreement, it involved interstate commerce. The respondents knew that the petitioners were located in New York. And as I said earlier, the respondent went ahead and participated after making a concession about the waiver and it participated in the arbitration, which it could have not participated.

And I have to say, I have real concerns, and I

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2 think I said this at the argument, about the officer at the
3 respondent who signed the agreement petitioner puts in,
4 says it could be fraud. What would happen to the
5 commercial world if such issues were lurking? You wouldn't
6 be able to have such agreements and so many commercial
7 agreements state that they are to be arbitrated if there's
8 a disagreement.

9 Under *Rogers v. Hopper*, which is 768 So.2d 963,
10 an Alabama case, the Supreme Court of Alabama held that the
11 qualities to determine whether it's a state agency or not
12 are whether the entity had the power to be sued or be sued,
13 the power to enter into contracts. Clearly, the respondent
14 has sued and been sued. They have entered into contracts;
15 precisely the contract here. They have the power to sell
16 and dispose of property. They own the property -- their
17 property in Alabama. The fourth thing is the power to
18 raise and issue bonds, and it has responsibility for its
19 financial obligations.

20 So these are factors. There actually is really
21 nothing in the record that I can recall about the power to
22 issue bonds, but I think as to the other factors it's
23 clear, and also, based on the findings of those other
24 courts.

25 The Alabama Code 41-9-65(a) provides that there
26 is a one-year statute of limitations for this action. So,

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2 as I said, the petitioner has been seriously prejudiced.

3 Okay. That's my decision. That would moot the
4 petitioner's request for the injunction I think. Do you
5 agree?

6 MR. KENNEDY: Agreed, Your Honor. Thank you.

7 THE COURT: Okay. Obviously, you have an
8 exception. Anyone have anything to say?

9 You can get the transcript. I'll sign the
10 transcript and so order it. And that's the order. That
11 obviously, can be appealed.

12 Is there anything else we need to do today?

13 MR. KENNEDY: No, Your Honor.

14 THE COURT: Okay, thank you very much.

15 You were wonderful. It was such an
16 interesting -- such interesting issues and such excellent
17 lawyering and I can't thank you enough, really.

18 MR. LUNSFORD: Thank you, Your Honor.

19 MR. KENNEDY: Thank you, Your Honor, I appreciate
20 that.

21 MR. LUNSFORD: I have one question, Your Honor,
22 about the TRO.

23 THE COURT: Yes, sir.

24 MR. LUNSFORD: Your Honor, just to clarify, the
25 Court had previously entered an order restraining us, is
26 that order considered over, done, moot?

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2 THE COURT: So I issued a TRO restraining you
3 from proceeding with the Alabama action to vacate the
4 arbitration award. Do you want to -- this case is done.

5 MR. BERG: Until you sign the order, Your Honor,
6 can we make that the rule just in case they do something
7 else? They've filed in many places. Until Your Honor
8 signs the order, can the TRO stay in place -- signs the
9 transcript?

10 THE COURT: Yes, you should probably also submit
11 an order and judgment on notice to the other side and it
12 gets submitted here to the part clerk. Do not submit it to
13 the office downstairs, I won't see it for six months.

14 MR. BERG: Okay.

15 THE COURT: So, please, submit it here; submit it
16 by e-mail, in person on notice, consistent with the court
17 rules, but submit it here on notice, okay?

18 MR. LUNSFORD: Your Honor, one question on that.
19 The order is, as I recall, it said that that order -- the
20 term of that order only extended through today's hearing.
21 So I thought by operation of just the timing set forth in
22 the order, it was over. And I don't know that -- I think
23 if Your Honor just confirms that the order is concluded by
24 its own terms, I think that is sufficient for our purposes
25 today.

26 THE COURT: I'm going to -- I would rather that

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2 there be a written order to that effect. So if you want to
3 submit that on notice to the other side, at least 24 hours
4 notice, I will do that, but I don't know how long it's
5 going to take to get the transcript, so I'd rather that
6 that consequential order be submitted and that it be in
7 writing, okay?

8 MR. LUNSFORD: Very good.

9 THE COURT: You can do it later today or whatever
10 you want, okay?

11 MR. LUNSFORD: Yes, ma'am.

12 THE COURT: And on notice to the petitioner, 24
13 hours. And, again, here. Don't bring it downstairs, okay,
14 here to Mr. Hanson.

15 MR. KENNEDY: Just for clarification, does that
16 mean --

17 THE COURT: So the stay is continuing until there
18 is a written order from the Court that it is lifted.

19 MR. KENNEDY: No, I understand and appreciate
20 that. Shall we not file using the ECF? I understand we
21 would bring it here, but --

22 THE COURT: No, no, you file it in ECF.

23 MR. KENNEDY: Thank you.

24 THE COURT: I'm just saying that you need to
25 alert Brendan. You know, we have 350 cases and they are
26 piling, just so you know. Something this consequential,

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you just need to alert him to go into ECF to look for it because we are not reviewing everything that is filed in all 350 cases, every day, all day. I think we would need a team of ten.

MR. KENNEDY: Understood, Your Honor.

THE COURT: You know, I don't have that. So thank you very much.

MR. KENNEDY: Thank you, Your Honor.

MR. BERG: Thank you, Your Honor.

* * * * *

I, Laura L. Ludovico, a senior court reporter for the State of New York, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes.

Laura L. Ludovico
Senior Court Reporter