

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JUDITH M. LYNN,)	
)	
Petition-Plaintiff,)	
)	
v.)	C.A. No. 7098-ML
)	
JOANNE F. ULLRICH, and)	
TERRANCE A. SHIELDS,)	
)	
Defendants.)	

MASTER’S REPORT

Date Submitted: October 25, 2012

Draft Report: January 25, 2013

Exceptions Submitted: April 9, 2013

Final Report: May 10, 2013

Arthur D. Kuhl, Esquire, of Reger Rizzo & Darnall, Wilmington, Delaware, Attorney for Plaintiff Judith M. Lynn.

Roger D. Landon, Esquire, and Lauren A. Cirrinicione, Esquire, of Murphy & Landon, Wilmington, Delaware, Attorney for Defendant Joanne F. Ullrich.

Jeffrey S. Friedman, Esquire, of Silverman McDonald & Friedman, Wilmington, Delaware, Attorney for Defendant Terrance A. Shields.

LEGROW, Master

This unusual action to enforce an arbitration agreement arises in the aftermath of an automobile accident, in which Joanne Ullrich, the driver and the defendant in this action, and Robin Brown, the passenger in Ms. Ullrich's car, both were injured. The Superior Court previously held that Ms. Ullrich entered into a binding agreement to arbitrate her claims against the plaintiff in this action, Judith Lynn, and that decision is the law of the case. Ms. Lynn initiated this action, however, because Ms. Ullrich refuses to proceed to arbitration before the arbitrator the parties selected in their initial agreement. Ms. Ullrich contends that the agreed upon arbitrator is biased and partial, because he previously arbitrated Ms. Brown's claims against Ms. Lynn. Ms. Lynn insists that the parties agreed to have the same arbitrator decide both Ms. Ullrich's claims and Ms. Brown's claims, and that Ms. Ullrich cannot now renegotiate the terms of the agreement. The named arbitrator has steadfastly refused to arbitrate Ms. Ullrich's case unless this Court orders him to do so, because the arbitrator believes that he cannot fairly and impartially judge the matter.

Despite Ms. Lynn's contention that it would be unfair, and inconsistent with Delaware's public policy favoring arbitration, to allow Ms. Ullrich to object to an arbitrator on the basis of a perceived conflict that Ms. Lynn contends Ms. Ullrich created, the reality is that it would be both unfair and incredibly inefficient to require the parties to arbitrate before an arbitrator who has withdrawn from the proceedings because he believes he cannot act in an impartial and unbiased manner. It is difficult to conceive of a result that would be more illogical or absurd. This Court will not order an arbitrator to arbitrate in violation of his ethical obligations, and I therefore recommend that the Court

deny Ms. Lynn's petition to enforce the arbitration agreement. This is my final report in this action.

I. FACTUAL BACKGROUND

The facts giving rise to this case arose almost seven years ago. On March 8, 2006, Terrence Shields was traveling on Governor Printz Boulevard when he proceeded through a stop sign and collided with a vehicle driven by Ms. Ullrich.¹ Ms. Brown was riding in the passenger's seat of Ms. Ullrich's vehicle. The collision caused Ms. Ullrich's vehicle to cross the median of Governor Printz Boulevard. Ms. Ullrich then exited her vehicle and was struck by Ms. Lynn. Ms. Ullrich suffered serious injuries as a result of the collisions.

In December 2006, Ms. Brown filed a lawsuit in Superior Court against Mr. Shields and Ms. Lynn, and in April 2007 Ms. Ullrich filed her own lawsuit against the same parties. Ms. Ullrich and Ms. Brown at the time were represented by the same attorney, Bernard G. Conaway, Esquire, and both lawsuits were assigned to Judge Tolliver, but the cases were not consolidated. In December 2007, the parties agreed to submit to non-binding arbitration pursuant to Superior Court Civil Rule 16. The arbitrator in that proceeding assigned a value of \$500,000 to Ms. Ullrich's claims, well in excess of Mr. Shields' and Ms. Lynn's combined insurance policy limits, which totaled \$200,000.

¹ Mr. Shields is named as a defendant in this action, but he has taken no position on the merits of the action. It appears that Mr. Shields concedes liability for his part in the accident.

Mr. Conaway and Ms. Lynn's counsel, Michael Pedicone, Esquire, then began discussing submitting the cases to binding arbitration. As Judge Tolliver later found, Mr. Conaway and Mr. Pedicone agreed, on behalf of their respective clients, to resolve Ms. Ullrich's claims against Ms. Lynn through binding high-low arbitration, in which damages were capped at \$100,000. Ms. Lynn agreed to pay the costs of the arbitration, the parties agreed to a date by which Mr. Conaway could submit an expert report, and the parties selected Daniel L. McKenty, Esquire, to arbitrate the agreement. The parties did not sign a formal arbitration agreement, but an April 2008 letter from Mr. Pedicone to Mr. Conaway memorializes the essential terms regarding deadlines, caps on damages, and costs.²

The parties agreed that Mr. McKenty would arbitrate both cases simultaneously.³ The arbitration proceeding that initially was scheduled with Mr. McKenty was postponed for reasons that are disputed and are not relevant to this action. Ms. Brown later agreed to arbitration, but before the arbitration hearing was rescheduled Ms. Ullrich had terminated Mr. Conaway as her attorney, retained new counsel, and taken the position that she never had authorized Mr. Conaway to agree to arbitration.⁴ Ms. Ullrich began to pursue her case in Superior Court, and Ms. Lynn filed a motion in the Superior Court to enforce the binding arbitration agreement and dismiss Ms. Ullrich's action in favor of arbitration.

² Joint Exhibit (hereinafter "JX") 4.

³ Pre-Trial Stipulation ¶ 2(E).

⁴ See *id.* at ¶¶ 2(F), (H).

After an evidentiary hearing, Judge Tolliver held that the evidence showed that Mr. Conaway believed that he had Ms. Ullrich's authority to enter into a binding arbitration agreement, and that Mr. Conaway's testimony that he had obtained Ms. Ullrich's authorization was credible.⁵ The Superior Court held:

The burden of proof in this matter is on Ms. Ullrich to demonstrate that she had not given Mr. Conaway any authority to enter into an agreement to proceed to binding arbitration. . . . The Court does not believe that Ms. Ullrich has met her burden. Accordingly, this Court must conclude that a binding and enforceable arbitration agreement was in fact entered into with respect to Ms. Ullrich's claims. As a consequence, this Court no longer has jurisdiction over these proceedings, and the matter must be dismissed. The parties may then present the controversy to a court of competent jurisdiction.⁶

While the Superior Court was resolving Ms. Lynn's motion to enforce the binding arbitration agreement, the parties arbitrated Ms. Brown's claims.⁷ That arbitration resulted in a decision from Mr. McKenty on August 14, 2009 that Mr. Shields was liable for Ms. Brown's injuries, but that Ms. Lynn was not liable. Mr. McKenty concluded:

At the end of the day, I do not believe that Plaintiff brought forth sufficient evidence that Defendant Lynn was negligent in the operation of her motor vehicle. Apart from plaintiff's expert report, which I found to be 'aggressive' in a number of respects, there is no evidence that Defendant Lynn was speeding, inattentive or driving her vehicle in a careless or reckless manner. Given the lighting conditions at the time of the accident and the fact that the Ullrich vehicle was without lights, the more reasonable conclusion is that Defendant Lynn happened upon an emergency occurring on the roadway, attempted to avoid that emergency and was unsuccessful in doing so. I found nothing in her conduct that breached any duty owed to the plaintiff and, as a consequence, she cannot be found liable in tort. To put it another way, there was not sufficient evidence to substitute the

⁵ *Ullrich v. Shields*, C.A. No. 07C-04-22 CHT, Slip Op. p. 9-10 (Del. Super. July 1, 2011).

⁶ *Id.* at p. 10-11.

⁷ Pre-Trial Stipulation ¶ 2(G).

judgment of the investigating police officer for that of plaintiff's retained expert.⁸

Almost two years later, and immediately after the Superior Court issued its opinion and order dismissing Ms. Ullrich's claims, Ms. Lynn's counsel wrote to Mr. McKenty, requesting that Mr. McKenty issue a new opinion concluding that Ms. Lynn was not liable for Ms. Ullrich's injuries.⁹ Ms. Lynn's counsel argued:

[a]s you have already heard all the evidence in the Brown case and there is no new liability evidence to present, and as you have already decided Lynn's liability in the Brown case that there was no negligence on her part, ... I would ask that you rely on the evidence already submitted and your prior ruling and issue a new decision in favor of defendant Lynn.¹⁰

Counsel for Ms. Ullrich and Ms. Lynn then engaged in an escalating standoff through correspondence copied, and at times addressed, to Mr. McKenty. Ms. Ullrich took the position that she could not be forced to arbitrate before Mr. McKenty, who already had decided the liability question in a manner adverse to Ms. Ullrich. Ms. Lynn took the position that arbitrating the dispute before Mr. McKenty was an essential term of the parties' agreement, and that she would not agree to another arbitrator.¹¹ On August 8, 2011, Mr. McKenty sent the parties a letter in which he indicated that he did not plan to convene an arbitration hearing to consider Ms. Ullrich's claims "unless directed to do so by the Court."¹² Mr. McKenty explained that he had come to the conclusion that he could not arbitrate Ms. Ullrich's claims because she was entitled to her "day in court"

⁸ JX 3 p. 1-2.

⁹ JX 7.

¹⁰ *Id.* at p. 1.

¹¹ *See* JX 8-13.

¹² JX 14, p. 2.

with a fact finder who had not previously decided the issues in the case.¹³ Ms. Lynn’s counsel asked that Mr. McKenty reconsider that position, but Mr. McKenty remained firm that he would not serve as an arbitrator in Ms. Ullrich’s case unless directed to do so by court order.¹⁴

Ms. Lynn then filed this action to enforce the arbitration agreement, contending that “there is no known conflict” precluding Mr. McKenty from serving as an arbitrator, and that Mr. McKenty is “ready, willing and able to serve as arbitrator in this case if ordered by the Court.”¹⁵ I denied Ms. Ullrich’s motion to dismiss the complaint, and a trial in this action was held on October 25, 2012.

Mr. McKenty was the only witness during trial. Mr. McKenty stated that, although he would not act in defiance of a court order directing him to arbitrate the case, he believed that he was partial and had prejudged the issues in the case.¹⁶ Mr. McKenty testified that he did not feel he could fairly and impartially arbitrate Ms. Ullrich’s claims.¹⁷ At the conclusion of trial, I took the case under advisement. This constitutes my final post-trial report.

II. ANALYSIS

The parties agree that the Delaware Uniform Arbitration Act (“DUAA”) governs their arbitration agreement. Section 5702 of that Act confers jurisdiction on this Court to

¹³ *Id.*

¹⁴ *See* JX 16.

¹⁵ Pet. and Compl. to Enforce Arbitration Agreement (hereinafter “Compl.”) ¶¶ 22, 24.

¹⁶ Trial Tr. (rough) 5:21-23.

¹⁷ *Id.* 13:6-18.

enforce an arbitration agreement.¹⁸ The DUAA also confers upon this Court jurisdiction to vacate an arbitration award where, *inter alia*, “[t]here was evident partiality by an arbitrator appointed as a neutral”¹⁹

Ms. Lynn urges this Court to issue an order directing the parties to arbitrate before Mr. McKenty, and requiring Mr. McKenty to arbitrate the parties’ dispute, because there are no ethical issues that bar Mr. McKenty from serving as arbitrator, and, in any event, Ms. Ullrich’s opposition to Mr. McKenty serving in that capacity is premature and only may be raised after the arbitration and in a petition to vacate an arbitration award. Ms. Lynn contends that allowing Ms. Ullrich to prevail in her efforts to secure a new arbitrator would “harm” the process of using binding arbitration in personal injury actions.²⁰ Ms. Lynn further argues that the importance of arbitration and the public policy in favor of it supports requiring Ms. Ullrich to abide by the terms of the parties’ agreement, including the arbitrator initially selected.

For her part, Ms. Ullrich contends that Mr. McKenty is not impartial or unbiased, because he has prejudged the factual and legal issues in the case, *i.e.* whether Ms. Lynn acted negligently in the course of the car accident. Ms. Ullrich draws parallels to both the Delaware Judges’ Code of Judicial Conduct and rules respecting bias or prejudice of jurors in support of her argument that Mr. McKenty may not arbitrate this case. Ms. Ullrich further argues that she should not be forced to arbitrate before an arbitrator who is biased or impartial, and that to grant the relief Ms. Lynn seeks would result in a “vain and

¹⁸ 10 *Del. C.* § 5702.

¹⁹ 10 *Del. C.* § 5714(a)(2).

²⁰ Pl.’s Op. Br. at 9-10.

useless act” because the award likely would be vacated by this Court under 10 *Del. C.* § 5714(a)(2).

As I see it, this case presents two questions: first, whether Ms. Ullrich’s assertion that Mr. McKenty is biased or partial is premature, and only may be resolved by this Court after the arbitration is concluded and an award has been entered, and second, whether an arbitrator who has withdrawn from an arbitration based on perceived ethical conflicts may nevertheless be ordered to arbitrate the case. For the reasons that follow, and based on the unusual facts of this case, I conclude that the answer to both questions is, in a word, no.

A. The Timeliness of Ms. Ullrich’s Assertion of Bias

It is elemental that arbitrators should be neutral and impartial, and the DUAA implicitly recognizes a party’s right to have her case decided by a neutral arbitrator.²¹ By definition, a neutral arbitrator is one who is impartial and unbiased.²² Although there is ongoing debate about the precise parameters of that standard, including the question of whether arbitrators are held to the same standards of conduct and impartiality as judicial

²¹ See *Milton Investments, LLC v. Lockwood Bros., II, LLC*, 2010 WL 2836404, at *11 (Del. Ch. July 20, 2010). See also *Speidel v. St. Francis Hospital, Inc.*, 2002 WL 1477828, at *6 (Del. Super. July 11, 2002). Such standards do not apply, of course, where the parties knowingly select a non-neutral arbitrator.

²² *Beebe Medical Center, Inc. v. InSight Health Services Corp.*, 751 A.2d 426, 433 (Del. Ch. 1999).

officers,²³ this case does not turn on that question. Mr. McKenty testified clearly and without reservation that he believes he cannot impartially arbitrate this matter.²⁴

Despite that testimony, Ms. Lynn contends that this Court should issue an order compelling the parties to arbitrate before Mr. McKenty because the issues of Mr. McKenty's purported bias or partiality are not properly before the Court at this time. In support of that argument, Ms. Lynn cites *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*,²⁵ a case in which this Court held that it lacked jurisdiction to adjudicate questions of an arbitrator's qualifications or purported partiality before the entry of an arbitration award.²⁶ As support for that sensible rule, the *Anadarko* Court relied upon a decision of the Southern District of New York, *Marc Rich & Co. v. Transmarine Seaways Corp.*,²⁷ in which that court reasoned:

[A] prime objective of arbitration law is to permit a just and expeditious result with a minimum of judicial interference. It seems to us that this objective can best be achieved by requiring an arbitrator ... to declare any possible disqualification, and then to leave it to his or her sound judgment

²³ See, e.g. *Beebe Medical Center, Inc.*, 751 A.2d at 433-434 (discussing the U.S. Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), to the effect that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges," and the issues raised by the concurring opinion of Justices White and Marshall stating their view that the majority opinion did not "decide that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges.")

²⁴ See Trial Tr.(rough) 5:17-23 ("Q: And you just mentioned an impartial finder of fact and impartial arbitrator. Would you have fit the bill of an impartial arbitrator at that point in your opinion? A: Well, no, because I prejudged the issues of negligence and I already found the facts as I found them the first time.") See also *id.* 13:6-18 ("Q [by the Court]: Mr. McKenty, do you feel that you could fairly and [impartially] arbitrate this matter? ... A: I'm sorry, Your Honor. No. Q [by the Court]: No, you don't feel you could fairly [and impartially] judge [the issues]? A: No, I do not.")

²⁵ 1987 WL 17445 (Del. Ch. Sept. 21, 1987).

²⁶ *Id.* at *2.

²⁷ 443 F. Supp. 386 (S.D.N.Y. 1978).

to determine whether to withdraw. The arbitrator must of course be aware that such a decision would be subject to judicial review after the award had been made.²⁸

The facts of this case, however, are markedly different from those in *Anadarko*. Unlike this case, the arbitrator in *Anadarko* was willing to serve, and presumably believed he could impartially resolve the issues in the case. Here, in contrast, Mr. McKenty has withdrawn from the matter because he believes he cannot impartially arbitrate the issues, and has indicated that he will not arbitrate unless ordered to do so by this Court.²⁹

Ms. Lynn appears to argue that Mr. McKenty could not decide the issue of his own objectivity, contending that “the arbitrator had no authority to decide if Ullrich was entitled to renegotiate the Arbitration agreement and select a new arbitrator.”³⁰ That argument falls under its own weight. Taken to its logical conclusion, Ms. Lynn’s position would require parties to arbitrate before a biased arbitrator, who wished to withdraw from a matter, because an arbitrator could not determine questions of his or her own neutrality, and a court could not resolve concerns about an arbitrator’s bias until after an arbitration award had been entered. It is difficult to conceive of a more inefficient rule. In any event, the argument is entirely contrary to existing case law. The Court in *Anadarko* explicitly endorsed the idea that an arbitrator should use “his or her

²⁸ *Anadarko*, 1987 WL 17445 at *2 (quoting *Marc Rich & Co. v. Transmarine Seaways Corp.*, 443 F. Supp. 386, 387(S.D.N.Y. 1978)).

²⁹ Mr. McKenty testified at trial that when he indicated he would convene the arbitration proceedings if ordered to do so by this Court, what he meant was that he would not “act in defiance of a court order,” but that he might nevertheless need to raise ethical concerns regarding compliance with such an order. *See* Trial Tr. (rough) 11:15-19.

³⁰ Pl.’s Op. Br. at 8.

sound judgment to determine whether to withdraw” from a case.³¹ That is precisely what Mr. McKenty has done here, and there is nothing in *Anadarko* or any other case that suggests that this Court will force an arbitrator to arbitrate when he or she has withdrawn from a matter citing ethical concerns.³²

I feel compelled to note that nothing in this decision is intended to suggest that Mr. McKenty could not arbitrate the parties’ dispute if he believed he could do so impartially and in an unbiased manner. Indeed, I would have reached a very different conclusion if Mr. McKenty had testified that he believed he could be impartial and objective. I have not concluded, and do not mean to suggest, that I believe that an arbitrator could not as a matter of law impartially arbitrate a dispute simply because he has arbitrated another party’s claims arising from the same nucleus of operative facts. I need not reach that conclusion, because Mr. McKenty has concluded that he does not believe he can be objective in this case, and the Court will respect that decision.

B. The (Im)practicalities of the Relief Ms. Lynn Seeks

As discussed above, the rule Ms. Lynn would have this Court adopt is the model of inefficiency. Forcing a party to arbitrate before an arbitrator who concedes he cannot

³¹ *Anadarko*, 1987 WL 17445 at *2.

³² *See, e.g., Milton Investments, LLC*, 2010 WL 2836404, at *11 and n. 98 (holding that arbitrator designated by the parties could arbitrate the matter because, among other things, the record did not reflect “evident partiality” by the arbitrator, and the arbitrator expressed the belief that he could be impartial and unbiased in an arbitration proceeding between the parties.); *City of Wilmington v. Am. Fed’n of State*, 2003 WL 21730641, at *1 and n. 4 (Del. Ch. July 18, 2003) (ordering subsequent arbitration proceedings to be held before the initial arbitrator, because there was nothing in the record that gave the Court reason to question the impartiality and objectivity of the initial arbitrator); *Speidel*, 2002 WL 1477828, at *6 (denying the plaintiff’s request to force the defendant to arbitrate before the agreed arbitrator, and holding that the Superior Court would not “order the parties to submit to binding high/low non-appealable arbitration with a person that Defendant believes may not make a fair and impartial finding”).

objectively consider the matter, and forcing an arbitrator to arbitrate a case when he has withdrawn citing ethical concerns, would not serve any conceivable purpose. Instead, it would undermine the parties' confidence in the proceedings, and likely lead to this Court vacating any award the arbitrator entered, resulting in a waste of time and resources. Just as the Court in *Anadarko* declined to become involved in questions of an arbitrator's partiality when the arbitrator was willing to serve, it seems equally clear that this Court should decline to order the parties to engage in a futile and inefficient act.³³

Ms. Lynn contends that even if I conclude that a conflict of interest exists in this case, the conflict is one of Ms. Ullrich's making. Ms. Lynn correctly points out that when the parties initially negotiated the arbitration agreement, they agreed that the same arbitrator would resolve both Ms. Ullrich's claims and Ms. Brown's claims. Ms. Lynn contends that it was only Ms. Ullrich's decision to later contest the arbitration agreement that caused the cases to become severed and resulted in Mr. McKenty hearing and deciding Ms. Brown's claims before Ms. Ullrich's claims. Ms. Lynn urges this Court to ignore this "self-created" conflict, arguing that if Ms. Ullrich succeeds in her effort to force arbitration before a new arbitrator, parties to arbitration agreements will engage in all manner of machinations in an effort to renegotiate the terms of their agreements.

There are two answers to this argument. First, although Ms. Lynn is correct that, if Ms. Ullrich had not contested the validity of the arbitration agreement, her claims would have been arbitrated at the same time as Ms. Brown's claims, it is equally true that

³³ See, e.g., *Am. Fed. of State*, 2003 WL 21730641, at *1 (efficiency should factor into decisions about how arbitration should proceed).

it was not Ms. Ullrich's decision that Ms. Brown and Ms. Lynn proceed to arbitrate in her absence. The decision to proceed without Ms. Ullrich is attributable to Ms. Lynn and Ms. Brown. If, in the alternative, Ms. Lynn and Ms. Brown had waited for the Superior Court to resolve Ms. Ullrich's arguments regarding the arbitration agreement, the parties claims could have been arbitrated together before Mr. McKenty. Accordingly, it cannot be said that these unusual circumstances are solely attributable to Ms. Ullrich.

More importantly, however, I remain skeptical that denying Ms. Lynn the relief she seeks in this case will have any effect on the efficacy of arbitration as a means of dispute resolution, or will encourage other parties to try to manufacture methods to avoid unfavorable terms in an arbitration agreement. Many arbitrators might have reached a different conclusion than Mr. McKenty, and agreed to proceed with the second arbitration because they believed they could do so impartially. In that case, this Court, consistent with *Anadarko*, likely would have granted a petition to enforce the arbitration agreement, and resolved any concerns about bias after entry of the arbitration award. Mr. McKenty, however, reached a different conclusion, which this Court respects and should honor. The parade of horrors that Ms. Lynn envisions seems unlikely to transpire simply because this Court has concluded that it will not order an arbitrator to participate in a matter from which he has withdrawn for ethical reasons.

III. CONCLUSION

For the foregoing reasons, I recommend that the Court deny the relief requested in Ms. Lynn's complaint. If the parties cannot reach an agreement on a new arbitrator, this

Court will appoint an arbitrator pursuant to 10 *Del. C.* § 5704.³⁴ This is my final report and exceptions should be taken in accordance with Rule 144.

Respectfully submitted,

/s/ *Abigail M. LeGrow*
Master in Chancery

³⁴ In her exceptions to my draft report, Ms. Lynn argues that the Court lacks jurisdiction to appoint a new arbitrator because Ms. Ullrich did not file a counterclaim requesting that relief. Ms. Ullrich did, however, request that relief in the pre-trial stipulation, and has since filed a separate motion asking this Court to appoint an arbitrator. *See* Pre-Trial Stipulation ¶ 4; Defendant’s Motion to Appoint an Arbitrator dated Apr. 23, 2013. Section 5704 allows this Court to appoint an arbitrator when the arbitrator initially appointed by the parties “fails or is unable to act,” and this Court may do so “on complaint or *on application in an existing case.*” 10 *Del. C.* § 5704 (emphasis added). I therefore conclude that the Court has authority to award this relief, although I will not take such action until the exceptions process is complete under Court of Chancery Rule 144.