Neutral Notes

The Jacobs Center for Justice and Alternative Dispute Resolution™

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RELIGIOUS DISPUTE SENT TO ARBITRATION

In Nicholas Matahen, et al. v. Mazooz Sehwail, et al., the Appellate Division, in New Jersey, ordered that the dispute among active members of defendant, the Islamic Center of Passaic County, Inc. (the mosque), had to resolve their issues in arbitration.

The mosque was incorporated in 1989 under the New Jersey Nonprofit Corporation Act. In its Articles, the mosque stated that it had members of its general assembly which were "all active members," meaning those who attend prayers regularly, participate actively, abide by the by-laws, pay dues, and practice Islam daily.

The general assembly is the highest authority in the mosque although the Board of Trustees (the board), which represents the general assembly, is the highest policy making authority.

All of the plaintiffs and individual defendants were members of the general assembly at the time of the incidents causing the complaint. Since they were members of the general assembly they were also active members. Several of the plaintiffs were also members of the Board.

The underlying complaint had to do with misuse of mosque credit cards and other business practices.

The bylaws included the following arbitration provision:

> The board shall create an Islamic Arbitration Committee of 3-5 members in case of disagreement among board members or general assembly members of matters related to the center, such committee shall consist of a Lawyer, an Imam, and Community Leaders. All disputes arising hereunder shall be resolved by arbitration by the aforementioned committee pursuant to policies and procedures established by such committee from time-to-time. All parties involved shall approve of the members of the Arbitration Committee. Decisions of the committee shall be binding on

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NO ARBITRATION ORDERED

In a case that largely dealt with the process of obtaining a law school education and degree, In re Leodegario D. Salvador v. Touro College, among the issues to be considered was a motion to compel arbitration which was denied. However, the main focus of the Appellate Division, First Department, in New York, had to do with petitioner's action to force an LL.M. degree to be conferred upon him as well as an award of damages.

Salvador had enrolled in an LL.M. program at Touro open to applicants holding law degrees from foreign universities. The application required the applicant to sign that his application was accurate and did not include misrepresentations. The petitioner had stated that he obtained a J.D. degree from Novus University School of Law which Touro assumed was in the Philippines. He failed to submit his transcript - it was not supplied to Touro until he had already begun classes. He was advised on January 26, 2012 that his Master's Degree would not be awarded to him because he had been admitted based on the erroneous belief that Novus was a foreign law school physically located in the Philippines.

Novus was an online school and, because of that fact, he was not eligible to be admitted to the LL.M. program at the time he applied. Salvador had been offered the option of a tuition refund but opted to continue with the pro-

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The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

NO FEE PAID—NO ARBITRATION

The Tenth Circuit Court of Appeals, in Pre-Paid Legal Services, Inc. v. Cahill, rejected Mr. Cahill's claims to proceed even though he had failed to pay arbitration fees with the American Arbitration Association.

Cahill had worked for Pre-Paid Legal Services and moved to stay court proceedings under the Federal Arbitration Act (FAA). Cahill had signed a non-compete with Pre-Paid and the dispute arose when he left Pre-Paid and went to another network marketing company.

Pre-Paid filed an action in Oklahoma state court alleging breach of contract. Cahill moved to stay the proceedings pending arbitration. In 2013, Pre-Paid initiated arbitration before the American Arbitration Association (AAA) and paid its share of the arbitration fee. Mr. Cahill did not. Pre-Paid declined to pay his share of the fees. The Director of ADR Services at AAA repeatedly warned Cahill's attorney that if he did not pay the arbitration proceedings would be suspended "which is exactly what happened."

The decision involved the interplay of FAA provisions and AAA rules regarding the effects of a stay as well as the payment of fees. Under AAA Rule 50 the parties are required to share arbitration expenses equally unless there is an agreement otherwise or a different assessment. Rule 54 provides if the payments are not made, AAA "may so inform the parties in order that one of them may advance the required payment." If the payments remain unpaid the arbitrator may order the suspension or termination of proceedings. And that is precisely what happened in this case.

There was a lengthy, complicated, and important analysis of the stay and when a stay may be lifted. There was also an interesting discussion regarding the similarity between lifting a stay or refusing a stay under § 16(a)(1)(A) of the FAA.

The Magistrate Judge at the initial stage ruled that the arbitration was not still pending "because the arbitrator has decided that the appropriate remedy for Cahill's failure to pay his share of costs was dismissal." AAA determined the arbitration had proceeded as far as it could and under the AAA rules the panel terminated the proceedings.

The Court rejected Cahill's arguments to reinstate his claims and said "[o]ur holding is consistent with decisions of other courts that have determined a party's failure to pay its share of arbitration fees breaches the arbitration agreement and precludes any subsequent attempt by that party to enforce that agreement."

The Court reasoned that Cahill breached the arbitration agreement by failing to pay his fees in accordance with AAA rules and was, therefore, not entitled to maintain the stay under Section 3 of the FAA.

The parties agreed, and the record demonstrated, that Cahill failed to pay his share of the arbitration fees. AAA asked him to pay; he did not show an inability to pay; nor did he ask the arbitrators to modify his payment or move for an order requiring Pre-Paid to pay his share so that arbitration could continue. Instead, he simply refused to pay and allowed arbitration to terminate. Under those circumstances, the Court stated:

> Failure to pay arbitration fees constitutes a "default" under § 3. Because Mr. Cahill failed to pay his arbitration fees, he was in "default." See *Garcia*, 2010 WL 2 at *4. ("[T]his default was . . . an intentional and/or reckless act because the AAA provided repeated notices to the Defendant that timely payment of the fee had not been received. . . . There is no other description the Court can find for this self-created situation other than 'default.'"); *1295 *Rapaport v. Soffer*, No. 2:10-cv-00935-KJD-RJJ, 2011 WL 1827147, at *2 (D. Nev. May 12, 2011) (unpublished) (finding the defendant was in default under § 3 because the AAA "closed" or "terminated" the case because of his failure to pay fees); *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 837-38 (Miss. 2003) (finding the defendant refused to pay its one-half of the costs pursuant to an arbitration agreement and that this constituted "default" under § 3). Because Mr. Cahill was in default, the district court was not obligated under § 3 to maintain the stay so that arbitration could proceed.

Part of Cahill's argument, also, was that there was not a formal finding of default. The Court held, however, in this case the absence of a formal finding of default did not preclude the District Court from making that determination under Section 3 of the FAA. The Court held that:

> Even assuming the issue of default must be left to the arbitrators, the arbitrators in this case found that Mr. Cahill was in default. Rather than alter the payment schedule, order Pre-Paid to pay Mr. Cahill's share, or relieve Mr. Cahill of his obligation to pay, the arbitrators first suspended and then terminated the proceedings and closed the case. As the district court found, this termination constituted a finding of default because it was the result of Mr. Cahill's failure to pay. See App. at 600 ("[A]lthough no order of default was entered, it is difficult to see termination of the proceedings under such circumstances as anything other than a declaration of default."); *id*. at 603.

CONCLUSION

The bottom line in this case is that under either approach advocated, the result is the same - Mr. Cahill's failure to pay his share of costs precluded him from seeking arbitration. The Court said that the FAA does not define default in Section 3. Some courts have viewed a party's failure to pay its share of the fees as a breach of the arbitration agreement which precludes any subsequent attempt to enforce that agreement.

PRACTICE TIP: The Court, in Pre-Paid, makes clear that a failure to pay fees required of the parties to initiate arbitration is, by itself, sufficient to justify default and to bar that party from proceeding to arbitration. While that conclusion may seem axiomatic, it apparently required several courts to review. One thought that I had was that it appears Appellant Cahill had engaged counsel and simply refused or declined to make payment. The justification for the failure to seek any modification, unfortunately, eluded me.

Religious Dispute Sent To Arbitration *(Cont'd from pg. 1)*

all parties and may be entered in a court of competent jurisdiction.

The trial court denied the motion to compel arbitration which is reviewable "de novo."

Plaintiffs argued that there was no contract but merely bylaws that had an arbitration provision and, thus, they would not be bound. The Court rejected that claim and said the mosque's bylaws constituted a contract between it and plaintiffs. There was also an argument that the provision bound only members of the general assembly or board and only pertained to "disagreements" concerning matters relating to the mosque. The Court rejected that claim and found plaintiffs were members of the general assembly and three were even members of the Board at the time of the alleged mishandling of mosque funds.

The Court concluded that all disputes pertaining to the mosque were intended to be handled by an arbitration committee as defined by its bylaws and, in particular, that an Imam be involved in the process. The fact that no "waiver" of court actions was included was not considered to be significant "under the particular factual circumstances here."

The Court concluded that the matter should be referred to arbitration in accordance with the bylaws which were passed by the board and continued in existence. The Court also acknowledged the unusual nature of the dispute but stated that plaintiffs merely find themselves "facing a bylaw they either composed or ratified by failing to amend its contents."

PRACTICE TIP: Religious institutions that include arbitration provisions will usually have disputes resolved in accordance with those arbitration clauses. Members, board members, and other participants should be mindful of their rights.

No Arbitration Ordered *(Cont'd from pg. 1)*

gram as a non-matriculated student so that he could qualify to take the District of Columbia bar exam.

Touro's position was that had it seen the transcript Salvador would not have been offered admission in the first place. The matter was brought to the Court on a motion to compel arbitration and, in the alternative, for dismissal.

The Appellate Division was quite clear that schools have a right to set their own qualification standards as well as the right to deny a degree. The Court stated that

> while there was no regulatory change … eligibility requirements existed from the outset, that petitioner either knew or should have known, regarding the types of schools an applicant must have attended for purposes of each LL.M. program; notably, those requirements were apparent from even a cursory reading of the school's website regarding those programs. While online schooling is becoming more prevalent, and it may, in the future, become an acceptable alternative to a degree from a so-called "brick and mortar" school, we are bound by the eligibility rules and prerequisite requirements established by the educational institution.

The Court also concluded that Salvador was complicit in keeping facts from the law school by failing to provide his transcript until months after his admission preventing the school from discerning the true nature of Novus. He also did not correct a misapprehension that Novus was located in the Philippines, thus "allowing the admissions officials to admit him on the basis of inaccurate information." The Court acknowledged that the petitioner did not "affirmatively or explicitly misrepresent facts on his application." However, it concluded that he omitted the critical fact that his school was not a "foreign law school" and that would have disqualified him from eligibility for entry into the LL.M. program. By submitting his application he was "implicitly stating that he satisfied the program's prerequisites for attendance…."

The Court did not deal with the motion to compel other than in footnote 2 where it stated that "[t]the denial of the branch of the motion to compel arbitration, and the grant of dismissal of petitioner's negligence cause of action, are not challenged here."

PRACTICE TIP: Schools maintain the integrity to determine their eligibility requirements and applicants should be truthful even by omission.

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