Case Summary: Arbitration

This is a motion directed to an arbitrator's award in which petitioner contends that the arbitrator exceeded his lawful authority by declining to find respondents' several breaches of the an agreement material and effectively re-writing the terms of the agreement concerning an easement. Petitioner also contended that the arbitrator erred in admitting certain emails into evidence during the hearing. The Court declined to disturb the arbitrator's award observing that vacatur is only appropriate where it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power. Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact. The evidentiary contention was also without merit as arbitrators are not bound by principles of substantive law and rules of evidence; instead, they may do justice as they see it, applying their own sense of law and equity to the facts as they find them to be and making an award reflecting the spirit rather than the letter of the agreement.

55 Misc.3d 1213(A)

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

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LUMBERJACK PASS AMUSEMENTS, LLC,

Petitioner,

v.

ROYAL HOSPITALITY, LLC, d/b/a COMFORT SUITES, GEORGE STARK and MARILYN STARK,

Respondents.

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**DECISION AND ORDER**

Index No. 63247

RJI No. 56-1-2016-0537

*Bartlett, Pontiff, Stewart & Rhodes, P.C.*, Glens Falls (*John D. Wright* of counsel), for petitioner.

*Hodgson Russ LLP*, Albany (*Richard L. Weisz* of counsel), for respondents.

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ROBERT J. MULLER, J.S.C.

Petitioner is a domestic limited liability company which owns and operates the

Lumberjack Pass miniature golf course (hereinafter Lumberjack Pass) located at 1511 State Route 9 in the Town of Queensbury, Warren County. Michael Giella and his wife, Mary Giella, are its sole members. Respondent Royal Hospitality, LLC is a domestic limited liability company which owns and operates the Comfort Suites Hotel (hereinafter the Comfort Suites) located at 1533 State Route 9 in Queensbury. Respondents George Stark and his wife, Marilyn Stark, are members of Royal Hospitality. Lumberjack Pass and the Comfort Suites are located next door to one another.[1]

The parties' longstanding dispute dates back to 2006 when construction of the Comfort Suites was underway. At that time it was discovered that respondents would need an easement over petitioner's property for the installation and maintenance of water and sewer lines. George Stark (hereinafter George Sr.) approached the Giellas with a proposed easement agreement, requesting that they sign it immediately so construction could continue as scheduled. The Giellas declined, however, advising that they would need time to review the proposed agreement with their attorney. George Sr. was apparently frustrated with this response and proceeded to visit the Giellas at their home on several occasions – at one point, visiting nine times in a single day – all in an effort to get them to sign the proposed agreement.

The parties ultimately settled their dispute with an agreement dated October 13, 2006 (hereinafter the 2006 agreement), which granted respondents a revocable easement over petitioner's property for the installation and maintenance of water and sewer lines. The 2006 agreement further provided that respondents would remove a fence along the common boundary of the properties, install "grass, mulch or low perennials to be maintained on a continuous basis"

[1] While there is a common boundary line at the rear of the properties, they are separated by a wedge shaped parcel along State Route 9 and do not share any road frontage.

and install "a stamped macadam walkway leading from [the Comfort Suites] to [Lumberjack Pass.]" Respondents also agreed to place signs and brochures in the hotel lobby advertising Lumberjack Pass – to the exclusion of all other miniature golf courses in the area – and put a link to the Lumberjack Pass website on both the Comfort Suites website and the website for the Mohican Motel, another hotel owned and operated by respondents.[2] The 2006 agreement also included the following damages clause:

> "If Grantee breaches its obligations under this [a]greement in any material way, it is agreed that Grantee will pay to Grantor the sum of $30,000.00 as agreed and stipulated damages."

Petitioner subsequently commenced an action against respondents in the Supreme Court of Warren County in 2008, seeking to revoke the easement as a result of respondents' alleged failure to comply with the terms of the agreement. During the course of that action Royal Hospitality filed for bankruptcy. The parties ultimately executed a second settlement agreement in the context of the bankruptcy proceeding, which agreement was approved by the Bankruptcy Court on February 21, 2012 (hereinafter the 2012 agreement). This 2012 agreement was intended to modify and supplement respondents' obligations under the 2006 agreement. It granted Royal Hospitality and "its successors, assigns, employees, servants and agents" a permanent easement over petitioner's property for the installation and maintenance of water and sewer lines.

The 2012 agreement required "Royal Hospitality, at its own cost and expense, [to] erect and maintain for the period of May 1st through Labor Day each year, four signs," attaching as an exhibit photos depicting where each of the four signs should be placed on the hotel property and how the signs should be oriented. The agreement next required "Royal Hospitality [to] modify

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[2] The Mohican Motel is located at 1545 State Route 9 in Queensbury and is also next door to the Comfort Suites. Specifically, it is situated on the northern side of the hotel while Lumberjack Pass is situated on the southern side.

the description of the choicehotels.com, the comfortsuiteslakegeorge.com and the mohicanmotel.com websites," attaching as an exhibit the exact descriptions to be used. The agreement further directed as follows:

> "Royal Hospitality shall distribute brochures provided by Lumberjack [Pass] in the hotel lobby during the period of May 1st through Labor Day of each year at the same location as all other brochures are displayed. Royal Hospitality shall display no other brochures for miniature golf courses, other than Lumberjack's miniature golf course; . . . Lumberjack shall provide to Royal Hospitality an 8 ½ x 11 inch sign in form reasonably acceptable to Royal Hospitality. This sign shall be conspicuously placed by Royal Hospitality alongside the brochures"

The 2012 agreement directed Royal Hospitality to pay a total of $115,000.00 to petitioner, $90,000.00 of which was "payable in sixty (60) monthly installments of $1,500.00 each, beginning on September 15, 2012 and continuing on the 15th day of each consecutive month thereafter until paid in full." The agreement was personally guaranteed by George Sr. and Marilyn Stark.

The 2012 agreement also included a provision whereby the Bankruptcy Court retained jurisdiction to enforce and interpret the agreement for a period of two years, following which "either party could seek enforcement of [the] [s]ettlement [a]greement by arbitration conducted pursuant to the rules of the American Arbitration Association [AAA] with venue in the County of Warren." In accordance with this provision, petitioner filed a demand for arbitration on November 19, 2015 alleging for four separate breaches of the 2012 agreement:

(1) respondents failed to properly place and maintain the four signs on the hotel property from May 1st through Labor Day;

(2) respondents failed to use the appropriate description on the choicehotels.com and comfortsuiteslakegeorge.com websites;

(3) respondents failed to display 8 ½ x 11 inch sign conspicuously alongside the Lumberjack Pass brochures and displayed brochures for other miniature golf courses; and

(4) respondents failed to make the $1,500.00 monthly payments in a timely manner.

While petitioner argued that it was entitled to $30,000.00 for each alleged breach under the damages provision of the 2006 agreement, it sought only $75,000.00 – which is apparently the maximum amount recoverable in an expedited arbitration under the AAA's Commercial Arbitration Rules. Respondents appeared in answer to the demand contending that none of the alleged breaches were material – as required under the damages provision of the 2006 agreement – and that the damages provision is an unenforceable penalty clause in any event.

James Barriere, Esq. was appointed as arbitrator and a 2-day hearing was held on May 11 and 12, 2016. The arbitrator then issued his decision on July 27, 2016. Initially, he found that the damages clause of the 2006 agreement did not constitute an unenforceable penalty clause. He further found, however, that none of the alleged breaches of the 2012 agreement were material and, as such, declined to award any damages to petitioner. Presently before the Court is petitioner's application to vacate this arbitration award and respondents' cross motion to confirm it.

Where, "'the parties agree to submit their dispute to an arbitrator, courts generally play a limited role'" (*Matter of Barron [State of N.Y. Off. of Mental Health]*, 135 AD3d 1111, 1112 [2016], *lv denied* 27 NY3d 905 [2016], quoting *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]; *see Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]; *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]). "Vacatur of an arbitration award is only appropriate where it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power. Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where

an arbitrator has made an error of law or fact" (*Union-Endicott Cent. Sch. Dist. v Peters*, 123 AD3d 1198, 1200-1201 [2015], *lv dismissed and denied* 25 NY3d 964 [2015] [internal quotation marks and citations omitted]; *accord Matter of Barron [State of N.Y. Off. of Mental Health]*, 135 AD3d at 1112; *see* CPLR 7511 [b] [1]; *Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90-91 [2010]).

Initially, petitioner contends that the arbitrator exceeded his lawful authority by declining to find respondents' several breaches of the 2012 agreement material and effectively re-writing the terms of the agreement.

Turning first to petitioner's allegation that respondents failed to properly place and maintain the four signs on the hotel property from May 1st through Labor Day, Mary Giella (hereinafter Giella) testified that respondents took the exterior signs down on the morning of Labor Day 2015, rather than waiting until the following day. She further testified that the exterior sign that was supposed to point down the path leading to Lumberjack Pass was instead oriented such that it pointed toward the nearby interstate. George Stark Jr. (hereinafter George Jr.), however, who is the General Manager of Comfort Suites, testified that he personally places and removes all exterior signs for Lumberjack Pass and that the signs were not removed until after Labor Day 2015. He further testified that the sign pointing down the path may have been moved by a guest such that it was no longer oriented in the correct direction, but that Lumberjack Pass was clearly visible down the path in any event.

Turning now to petitioner's allegation that respondents failed to use the appropriate description on the choicehotels.com and comfortsuiteslakegeorge.com websites, the 2012 agreement required respondents to include the following description on the home page – or hotel highlights page – of the choicehotels.com website:

> "The Comfort Suites Lake George New York hotel is near the Great Escape & Splashwater Kingdom and right next door to **Lumberjack Pass Miniature Golf & Fore! Ice Cream Burgers & More. Lumberjack Pass Mini Golf** is ranked # 5 in the top 10 craziest mini golf courses on earth by entertainmentdesigner.com. **Lumberjack Pass Miniature Golf** is a must do in Lake George!"

The 2012 agreement further required the following description on the rates and reservations page of the comfortsuiteslakegeorge.com website:

> "The Comfort Suites Lake George New York hotel is near the Great Escape & Splashwater Kingdom and right next door to **Lumberjack Pass Miniature Golf & Fore! Ice Cream Burgers & More. Lumberjack Pass Mini Golf** is ranked # 5 in the top 10 craziest mini golf courses on earth by entertainmentdesigner.com. Lumberjack Pass Miniature Golf is a must do in Lake George!"

Giella testified that the choicehotels.com website never included the correct description on the correct page of the website and that, while the correct description was included for a time on the rates and reservations page of the comfortsuiteslakegeorge.com website, it disappeared when the website was updated to a more "mobile friendly" version. According to Giella, it then reappeared shortly before the arbitration hearing.

George Jr. testified that he does not maintain the choicehotels.com website, as Choice Hotels is the corporation under which Comfort Suites is operated. He did, however, correspond with representatives of Choice Hotels on numerous occasions in an attempt to get the correct language on the correct page of the website. He also indicated that, while the language is not exact, it is very close to the desired description of Lumberjack Pass. George Jr. further testified that he was unaware that the language disappeared from the rates and reservations page of the comfortsuiteslakegeorge.com website when it was updated, but immediately contacted his website administrator to have the problem addressed once he became aware of it.

Insofar as petitioner's allegation that respondents failed to properly display the 8 ½ x 11 inch sign and displayed brochures for other miniature golf courses is concerned, Susan Yarter –

who was hired by petitioner – testified that she went into the lobby of the Comfort Suites on September 2, 2015 and took several photographs. These photographs depict two 4-tiered baking racks placed side by side and a smaller brochure shelf directly to their right. The Lumberjack Pass brochures can be seen on the bottom half of the brochure shelf while the 8 ½ x 11 Lumberjack Pass sign is on the baking rack farthest from the brochure shelf, located on the third shelf down and partially obscured by other brochures placed in front of it. Giella testified that these photographs also depict a brochure for Gooney Golf – another miniature golf course in the area – in the "Dollar Busters" stand on the top of the middle baking rack.[3]

George Jr. testified that the portion of the lobby with the baking racks and brochure shelf is not visible from the front desk and distributors who deliver brochures and other tourist material often place the items wherever there is space. He also indicated that guests frequently move items on the baking racks and brochure shelf. If he or Marilyn Stark – his mother, who also works at Comfort Suites – notices that the Lumberjack Pass sign is not conspicuously placed next to the Lumberjack Pass brochures, they immediately remedy the situation. Insofar as the Gooney Golf brochures were concerned, he testified that he was not aware they were there because he thought the "Dollar Busters" stand contained only coupons. He also indicated that he removed the Gooney Golf brochures once he became aware of them.

Finally, with respect to petitioner's allegation that respondents failed to make the $1,500.00 monthly payments in a timely manner, Giella testified that many of the payments were not sent until the 17th of the month – as opposed to the 15th of the month. Marilyn Stark then testified that she always sent the checks and tried to send them on the 15th of the month, but

[3] It is observed that this brochure is too small to decipher in the photographs themselves, which are attached as an exhibit to petitioner's submissions.

would occasionally send them later if the 15th fell on a weekend or holiday, or if some other extenuating circumstance existed. Notably, Giella admitted that respondents have made all of the $1,500.00 payments thus far.

In view of the testimony presented at the hearing the Court finds that the arbitrator did not exceed his authority in finding that respondents did not breach their obligations under the 2012 agreement in any material way. Although not defined in either the 2006 or the 2012 agreement, the term "material" is ordinarily used to describe something "[h]aving some logical connection with the consequential facts" (Black's Law Dictionary, 991 [7th ed 1999]). While respondents performance under the 2006 and 2012 agreements has not been perfect – as petitioners clearly expected it to be – there was ample testimony to suggest that any breaches were minimal and of no consequence. Although the testimony could also support the opposite conclusion, it is not for this Court to substitute its judgment for that of the arbitrator (*see Matter of United Fedn. of Teachers, Local 2, AFT, AFL–CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 82-83, [2003]; *Matter of Massena Cent. School Dist. [Massena Confederated School Employees' Assn., NYSUT, AFL-CIO]*, 64 AD3d 859, 862-863 [2009]). Rather, "'courts are obligated to give deference to the decision of the arbitrator'" (*Matter of Massena Cent. School Dist. [Massena Confederated School Employees' Assn., NYSUT, AFL-CIO]*, 64 AD3d at 863, quoting *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL–CIO*, 6 NY3d 332, 336 [2005]).

Petitioner further contends that the arbitrator erred in admitting certain emails into evidence during the hearing. The 2012 agreement directed respondents to put a link to petitioner's website on the choicehotels.com website or – if Choice Hotels would not permit such a link – to instead include the description of Lumberjack Pass on the website, as set forth above.

During the testimony of George Jr., respondents sought to admit certain emails between employees of Choice Hotel stating that a link to the Lumberjack Pass website would not be permitted on the choicehotels.com website. These emails were apparently forwarded to George Jr. in response to his inquiry. Petitioner objected to the emails as hearsay, but the arbitrator admitted them under the business record exception.

This evidentiary contention is without merit. "[A]bsent a provision in the arbitration clause, arbitrators are not bound by principles of substantive law and rules of evidence; instead, they may do justice as they see it, applying their own sense of law and equity to the facts as they find them to be and making an award reflecting the spirit rather than the letter of the agreement" (*Matter of Board of Educ. of Oneonta City School Dist. [Moore]*, 229 AD2d 888, 889 [1996]; *see Matter of Massena Cent. School Dist. [Massena Confederated School Employees' Assn., NYSUT, AFL-CIO]*, 64 AD3d at 864; *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]). The arbitration clause under consideration herein clearly does not include a provision indicating that the arbitrator is bound by principles of substantive law and rules of evidence. As such, even if the emails did constitute inadmissible hearsay, it is inconsequential.

Finally, petitioner contends that the arbitration award must be vacated because the arbitrator lived on the same street as respondents' counsel for approximately five years and failed to disclose the same.

This contention is also without merit. Both the arbitrator and counsel for respondents have submitted affidavits confirming their former addresses, but indicating that they lived at these addresses over 10 years ago and never knew one another. According to counsel for respondents, "[t]he two (2) houses are approximately a quarter mile apart and further separated by a ravine."

Based upon the foregoing, the petition to vacate the arbitration award is denied and,

further, the cross motion to confirm the arbitration award is granted.

Therefore, having considered the petition of Lumberjack Pass Amusements, LLC with exhibits attached thereto, verified on October 25, 2016; affidavit of John D. Wright, Esq. with exhibits attached thereto, sworn to October 25, 2016, submitted in support of the petition; affidavit of Richard L. Weisz. Esq. with exhibits attached thereto, sworn to November 15, 2016, submitted in opposition to the petition and in support of the cross motion; affidavit of James J. Barriere, Esq. with exhibits attached thereto, sworn to November 4, 2016, submitted in opposition to the petition and in support of the cross motion; memorandum of law of Richard L. Weisz, Esq., dated November 15, 2016, submitted in opposition to the petition and in support of the cross motion; and reply memorandum of law of John D. Wright, Esq., dated November 29, 2016, submitted in further support of the petition and in opposition to the cross motion; and oral argument having been held on April 20, 2017 with John D. Wright, Esq. appearing on behalf of petitioner and Richard L. Weisz, Esq. appearing on behalf of respondents, it is hereby

**ORDERED** that the petition to vacate the arbitration award is denied; and it is further

**ORDERED** that the cross motion to confirm the arbitration award is granted.

The above constitutes the Decision and Order of this Court.

The original of this Decision and Order has been filed by the Court together with the Notice of Petition dated October 25, 2016 and the Notice of Cross Motion dated November 15, 2016. Counsel for respondents is hereby directed to promptly obtain a filed copy of the Decision and Order for service with notice of entry upon counsel for petitioner in accordance with CPLR 5513.

Dated: April 26, 2017
Lake George, New York

_____s/_____
ROBERT J. MULLER, J.S.C.