UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THE CENTERCAP GROUP, LLC,

Petitioner,

15 Civ. 9823 (DAB)
MEMORANDUM & ORDER

v.

OPTIO, INC.,

Respondent.
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DEBORAH A. BATTS, United States District Judge.

On December 17, 2015, Petitioner The CenterCap Group, LLC filed a Petition to Confirm an Arbitration Award against Respondent Optio, Inc. This case stems from a contractual dispute about a finder's fee allegedly owed by Respondent to Petitioner for a real estate investment. Petitioners seek affirmation of the Award of $2,059,743 in total plus interest and additional fees. On February 4, 2016, Respondent filed a Motion to Vacate the Arbitration Award and in opposition to the Petition. For the following reason, the Petition is AFFIRMED, and Respondent's Motion is DENIED.

I. BACKGROUND

The facts set forth in brief here are primarily drawn from the Final Award (Decl. James F. Moyle Supp. Pet. Confirm

Arbitration Award ("Moyle Decl."), Ex. A (the "Final Award") and are set forth in greater detail in that document.

Petitioner is a financial services company that provides advisory, capital raising, consulting, and other services to middle market and public sector companies in the real estate industry. (Id. at 2.) Respondent was[1] an early phase company, which itself, or through its affiliates, sought to acquire, develop, and manage housing communities, primarily serving armed forces personnel. (Id.)

The parties enter into a written agreement, dated November 14, 2011 (the "November Agreement" or the "Agreement"), under which Petitioner would introduce potential investors to Respondent, and if any of those investors provided funds, Respondent would pay a finder's fee to Petitioner. (Id.; Moyle Decl., Ex. B). The fee was to be equal to 2% of any capital raised by Respondent as a result of an introduction by Petitioner. (Final Award at 3; Moyle Decl., Ex. B ¶ B.) The November Agreement included an arbitration clause that provided that any case arising out of the Agreement would be settled by arbitration. (Moyle Decl., Ex. B ¶ G.)

[1] The Final Award uses "was" in its description of Respondent. Respondent clearly has financial difficulties, but the Court is unaware of its precise status.

The parties amended their Agreement on April 25, 2012 (the "April Amendment"). (Final Award at 4; Moyle Decl., Ex. C.) The April Amendment revised the finder's fee to 1.75% on the first $50,000,000 of any capital commitment and 1.5% of any capital committed in excess of $50,000,000. (Final Award at 4; Moyle Decl., Ex. C ¶ A.) The parties amended the Agreement again on February 7, 2013 to provide:

> **Securities are offered through CC Securities, LLC ("CC Securities"), member FINRA/SIPC. CC Securities is a wholly owned subsidiary of The CenterCap Group, LLC. CC Securities shall be paid such compensation due to [Petitioner] (pursuant to Section B of the Agreement and Section A of the Amendment) unless CC Securities, LLC consents to the assignment by [Petitioner] of the right to such payment of compensation to another person or entity.**

(Final Award at 13; Decl. Robert Kaplan Opp. Pet. Confirm the Arbitration Award ("Kaplan Decl."), Ex. Q.) The parties allegedly included this clause because they were not sure if any transaction would involve securities, and CC Securities is a registered broker-dealer under FINRA and federal securities laws. (Final Award at 13.)

Petitioner introduced Respondent to approximately forty prospects. (Id. at 4.) At issue in the Arbitration is the finder's fee allegedly owed as a result of Petitioner's introduction of Respondent to BLT. (Id.) BLT and Respondent closed on ten real property acquisitions, with BLT funding a total of $128,982,877, resulting in a finder's fee of

$2,059,743. (Id.) Respondent has not paid any of this finder's fee to Petitioner. (Id. at 5.)

Arbitration hearings were held on June 8, 9, and 10, 2015. (Id. at 1.) Both parties were represented, and the Arbitrator heard witnesses, received expert witness reports, and received extensive exhibits and briefing from the parties. (Id.) During the Arbitration, Respondent asserted defenses including that Petitioner did not suffer any harm because Respondent actually owed money to CC Securities, not Petitioner, by virtue of the February 7, 2013 Amendment, so Petitioner did not suffer any harm. (Id. at 12-15.) The Arbitrator rejected Respondent's arguments and found in favor of Petitioner in the amount of $2,059,743 plus interest through September 30, 2015 of $89,602, 4% interest from October 1, 2015 through the date of the issuance of the Award (October 12, 2015), and 9% per annum interest thereafter on the principal amount until payment is made. (Id. at 18.) The Arbitrator held that Respondent bears $12,575 of the administrative fees of the AAA and that the Arbitrator's fees and expenses of $40,310 were to be borne equally. (Id. at 19.)

In moving to vacate the Final Award, Respondent also asserts the Arbitrator improperly questioned its chief executive officer, Jeffrey Szorik, about entity-level investments on June 10, 2015. Despite the fact that Respondent had raised capital,

including the investment from BLT, it still needed an entity-level investment of $2,000,000. Respondent has excerpted at length portions of the hearing transcript in its Memorandum of Law in Opposition to the Petition to Confirm the Arbitration Award. After that hearing, during a June 11, 2015 telephone call, the Arbitrator asked the parties if having an investor provide Respondent with capital would make a difference in resolving the case, informed both parties' attorneys that she was considering presenting Respondent as an investment opportunity to one of her relatives, asked Respondent if it had any interest in this proposal, and said that she wanted to see if the parties had any interest in the idea before presenting it to the American Arbitration Association. (Decl. Robert E. Shapiro Opp. Pet. Confirm the Arbitration Award ("Shapiro Decl.") ¶ 4; Decl. James F. Moyle Further Supp. Pet. Confirm Arbitration Award ("2d Moyle Decl.") ¶¶ 3-5.) In a subsequent call, however, the Arbitrator told the attorneys that she had reconsidered that idea. (Shapiro Decl. ¶ 5; 2d Moyle Decl. ¶ 6.) Respondent did not raise any bias-related issues during the Arbitration. (2d Moyle Decl. ¶ 6.)

II. Discussion

A. Standard for Vacatur under the Federal Arbitration Act

Under the Federal Arbitration Act (the "FAA"), the Court must affirm the award "unless the award is vacated, modified." 9 U.S.C. § 9. "Normally, confirmation of an arbitration award is 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.'" D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) (quoting Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984)). "Arbitration awards are subject to very limited review," Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993), with the party moving to vacate the award carrying the burden of proof. D.H. Blair, 462 F.3d at 110.

"The arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case. Only a barely colorable justification for the outcome reached by the arbitrators is necessary to confirm the award." Id.; see also Trs. of N.Y.C. Dist. Council of Carpenters Pension Fund v. Dejil Sys., Inc., No. 12 Civ. 005 (JMF), 2012 WL 3744802, at *3 (S.D.N.Y. Aug. 29, 2012) ("Where . . . there is no indication that the arbitration decision was made arbitrarily, exceeded the arbitrator's jurisdiction, or

otherwise was contrary to law, a court must confirm the award upon the timely application of any party.").

B. Whether the Arbitrator's Behavior Requires Vacatur of the Arbitration Award

Respondent argues that, pursuant to 9 U.S.C. § 10(a)(3), the Arbitration Award should be vacated because the Arbitrator's inquiry into a potential investment opportunity for a relative constitutes misconduct by which its rights have been prejudiced. Petitioner contends that Respondent waived this objection and that, in any event, the Arbitrator's behavior does not provide grounds for vacating the Arbitration Award under 9 U.S.C. §§ 10(a)(2) or (3).

1. Whether Respondent Waived Its Objection

Petitioner argues that Respondent waived its objection to any partiality or misconduct by the Arbitrator because it had knowledge of the alleged impropriety but failed to raise its objection until after the Final Award had been entered.

"Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection." AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc., 139 F.3d 980, 982 (2d Cir. 1998) (quoting Ilios

Shipping & Trading Corp. v. Am. Anthracite & Bituminous Coal Corp., 148 F. Supp. 698, 700 (S.D.N.Y.), aff'd, 245 F.2d 873 (2d Cir. 1957)); see also LGC Holdings, Inc. v. Julius Klein Diamonds, LLC, 238 F. Supp. 3d 452, 467-69 (S.D.N.Y. 2017); Rai v. Barclays Capital Inc., 739 F. Supp. 2d 364, 374 (S.D.N.Y. 2010), aff'd, 456 F. App'x 8 (2d Cir. 2011). In this case, Respondent was aware about the allegedly inappropriate inquiry by the Arbitrator into an investment opportunity for one of her relatives prior to the entry of the Final Award. Respondent, however, did not raise that objection until it requested that this Court vacate the Arbitration Award. Respondent has thus waived its objection to any alleged bias by the Arbitrator.

Respondent's cited case, United States v. Microsoft Corp., 253 F.3d 34, 108-09 (D.C. Cir. 2001), is factually inapposite as it involved alleged impropriety by a United State District Judge, not an arbitrator. Tiffany & Co. International v. Dhirim, Inc., No. 09 CIV. 5845 (AKH), 2009 WL 2569190 (S.D.N.Y. Aug. 19, 2009), is more similar to the present case. There, the arbitrator's firm had sought to provide accounting services to the party seeking vacatur, but that party chose not to engage the firm. Id. at *1. The Court held that the party "was aware of this alleged fault at the time of the arbitration, and waived its right to object by waiting until issuance of an unfavorable award to do so." Id.

2. Whether the Arbitrator's Purported Bias Requires Vacatur

Although Respondent has waived its objection, the Court briefly addresses its arguments regarding bias. See Van Buren v. Cargill, Inc., No. 10-CV-701, 2016 WL 231399, at *5 (W.D.N.Y. Jan. 19, 2016).

a. Partiality or Bias under 9 U.S.C. § 10(a)(2)

9 U.S.C. § 10(a)(2) provides that a district court may vacate an arbitration award "where there was evident partiality or corruption in the arbitrators." The Second Circuit has held that "'evident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984). "Although the party seeking vacatur must prove evident partiality by showing something more than the mere appearance of bias, proof of actual bias is not required. Rather, partiality can be inferred from objective facts inconsistent with impartiality." Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 878 F. Supp. 2d 459, 464 (S.D.N.Y. 2012) (internal citations, quotations, and alterations omitted).

The questions by the Arbitrator concerning the $2,000,000 entity-level financing are not evidence of bias. Given the

nature of the proceeding (real estate investment) and Respondent's alleged failure to be able to raise this relatively small amount of money given the large amount it had raised from BLT, it was reasonable for the Arbitrator to inquire about the entity-level financing. While the Arbitrator's idea of proposing an investment with Respondent to a relative is questionable, any bias that Respondent contends it shows is speculative. See Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 72 (2d Cir. 2012) (holding that conclusion of partiality must be based on objective facts rather than speculation). The Arbitrator's idea was fully disclosed to the parties and was withdrawn shortly thereafter. If anything, having a relative invest with Respondent would show bias in favor of Respondent. Accordingly, the Court holds that Respondent has not met its burden under 9 U.S.C. § 10(a)(2).

b. Misconduct under 9 U.S.C. § 10(a)(3)

A district court may vacate an arbitration award under 9 U.S.C. § 10(a)(3) "where the arbitrators were guilty of misconduct . . . by which the rights of any party have been prejudiced." "[T]he concept of 'fundamental fairness' has been described as the 'touchstone' for a finding of arbitral misconduct under the FAA." British Ins. Co. of Cayman v. Water St. Ins. Co., 93 F. Supp. 2d 506, 517 (S.D.N.Y. 2000).

Respondent has also failed to meet this burden for the same reasons as set forth supra pp. 8-9 with respect to 9 U.S.C. § 10(a)(2).

C. Whether the Arbitrator Manifestly Disregarded the Terms of the Parties' Agreements

Courts in the Second Circuit give substantial deference to an arbitrator's resolution of a contract dispute. Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997). The Second Circuit has identified three factors to consider in evaluating whether an arbitrator's decision should be vacated for manifest disregard of the law. The first factor is "whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators. An arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Thus, misapplication of an ambiguous law does not constitute manifest disregard." Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 93 (2d Cir. 2008), rev'd on other grounds, 559 U.S. 662 (2010). Second, the Court asks whether "the law was in fact improperly applied, leading to an erroneous outcome." Id. Under this factor, "[e]ven where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts of the case." Id. The third factor is whether the arbitrator knew of the law's existence and its

applicability to the issue at hand—in other words, whether the arbitrator intentionally disregarded the law. Id.; see also Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 222 (2d Cir. 2002) ("Under our heightened standard of deference, vacatur for manifest disregard of a commercial contract is appropriate only if the arbitral award contradicts an express and unambiguous term of the contract or if the award so far departs from the terms of the agreement that it is not even arguably derived from the contract.").

Respondent has failed to meet its burden as the Arbitrator has provided more than a barely colorable justification for its Final Award. See D.H. Blair, 462 F.3d a 110. Respondent simply recycles the same arguments here as they did before the Arbitrator. It argues that only CC Securities was entitled to payment under the Agreements.

The Court finds, upon limited review, that the Arbitrator's interpretation of the February 7, 2013 Amendment to sufficiently justify the rejection of Respondent's argument and, thus, the Final Award. The Arbitrator held that "[t]o require 'all compensation' to be paid to CC Securities would render the word 'such' meaningless," and adequately cited case law to support that contention. (Final Award at 13-14.) As a result, it was reasonable for the Arbitrator to consider testimony in interpreting the provision. Thus, the Arbitrator adequately

justified her ruling that, because it was not a securities transaction, compensation was owed to Petitioner, not CC Securities.

Accordingly, Petitioner has failed to meet its burden in demonstrating that the Arbitrator manifestly disregarded the terms of the Agreements.

III. CONCLUSION

For the foregoing reasons, the Petition to Confirm the Arbitration Award is GRANTED and the Motion to Vacate is DENIED. The Clerk of Court is directed to enter judgment in favor of Petitioners and against Respondent in the amount of $2,059,743 plus interest through September 30, 2015 of $89,602; 4% interest from October 1, 2015 through October 12, 2015 (the date of the issuance of the Award); 9% per annum interest thereafter on the principal amount until payment is made; $12,575 of the administrative fees of the American Arbitration Association; and $20,155 of the Arbitrator's fees and expenses.

SO ORDERED.

DATED: New York, NY
March 14, 2018

Deborah A. Batts
United States District Judge