

20-3451-cv
Hermes v. Swain

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the
3 8th day of November, two thousand twenty-one.
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5 Present:

6 DEBRA ANN LIVINGSTON,
7 *Chief Judge,*
8 REENA RAGGI,
9 GERARD E. LYNCH,
10 *Circuit Judges.*

11 _____
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13 HERMES OF PARIS, INC.,

14 *Petitioner-Appellee,*

15
16
17 v.

20-3451-cv

18
19 MATTHEW SWAIN,

20 *Respondent-Appellant.*
21
22 _____

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24 For Petitioner-Appellee:

LAWRENCE R. SANDAK (Edna Doris Guerrasio, *on the*
brief), Proskauer Rose LLP, New York, NY.

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27 For Respondent-Appellant:

CHRISTOPHER W. HAGER, Hager Law, LLC,
Morristown, NJ.

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30 Appeal from a judgment of the United States District Court for the Southern District of
31 New York (McMahon, *J.*).

1 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
2 **DECREED** that the judgment of the district court is **AFFIRMED**.

3 Matthew Swain (“Swain”) appeals from the district court’s September 17, 2020 judgment
4 confirming an arbitration award that dismissed his claims against Hermès of Paris, Inc. (“Hermès”)
5 as untimely. For the reasons set forth herein, we affirm the district court’s judgment. We
6 assume the parties’ familiarity with the underlying facts, the procedural history of the case, and
7 the issues on appeal.

8 **1. Confirmation of the Arbitration Award**

9 Swain contends that the district court erred in confirming the arbitrator’s dismissal of his
10 claims as time-barred, arguing that the arbitrator lacked the authority to consider such a defense
11 under the parties’ arbitration agreement. In other words, he asserts that limitations defenses are
12 not arbitrable under the agreement. We disagree.

13 In considering Swain’s challenge, this Court reviews the district court’s legal rulings *de*
14 *novo* and its findings of fact for clear error. *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 118 (2d
15 Cir. 2011). The district court’s review of the arbitrator’s judgment is “‘severely limited’ in view
16 of the strong deference courts afford to the arbitral process.” *Certain Underwriting Members of*
17 *Lloyds of London v. Fla., Dep’t of Fin. Servs.*, 892 F.3d 501, 505 (2d Cir. 2018) (quoting *ReliaStar*
18 *Life Ins. Co. of N.Y. v. EMC Nat’l Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009)). The purpose of this
19 “limited review” is to “avoid undermining the twin goals of arbitration, namely, settling disputes
20 efficiently and avoiding long and expensive litigation.” *Landau v. Eisenberg*, 922 F.3d 495, 498
21 (2d Cir. 2019) (internal quotation marks and citation omitted).

22 Under the “federal substantive law of arbitrability,” “most disputes between parties to a
23 binding arbitration agreement are ‘arbitrable,’ meaning that they are to be decided by the

1 arbitrators, not the courts.” *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 129 (2d Cir.
2 2015). “Any doubts concerning the scope of arbitrable issues should be resolved in favor of
3 arbitration, whether the problem at hand is the construction of the contract language itself or an
4 allegation of waiver, delay, or a like defense to arbitrability.” *Id.* at 130 (alteration and citation
5 omitted). In other words, this Court “must construe the parties’ intentions ‘generously’ in favor
6 of arbitrability.” *Bechtel do Brasil Construcoes Ltda. v. UEG Araucária Ltda.*, 638 F.3d 150,
7 154 (2d Cir. 2011) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S.
8 614, 626 (1985)).

9 This Court having previously determined that the subject matter of the parties’ dispute is
10 subject to arbitration, *see Hermès of Paris, Inc. v. Swain*, No. 16-CV-6255, 2016 WL 4990340
11 (S.D.N.Y. Sept. 13, 2016), *aff’d*, 867 F.3d 321 (2d Cir. 2017),¹ the limitations question was
12 “presumptively” for the arbitrator to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S.
13 79, 84 (2002); *see John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (“Once it is
14 determined, as we have, that the parties are obligated to submit the subject matter of a dispute to
15 arbitration, ‘procedural’ questions which grow out of the dispute and bear on its final disposition
16 should be left to the arbitrator.”). Although this presumption of arbitrability may be rebutted with
17 “express language in the contract referring to a court questions concerning the timeliness of a
18 demand for arbitration,” the arbitration agreement between Swain and Hermès contains no such
19 language. *Conticommodity Servs. Inc. v. Philipp & Lion*, 613 F.2d 1222, 1227 (2d Cir. 1980);
20 *see Martens v. Thomann*, 273 F.3d 159, 179 n.14 (2d Cir. 2001) (“[I]f the claims are subject to a
21 valid and enforceable arbitration agreement, the arbitrator, not the court, should be deciding the

¹ On appeal, Swain conceded the arbitrability of his dispute with Hermès. *See Swain*, 867 F.3d at 323.

1 statute of limitations issue.”); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 121 (2d
 2 Cir. 1991) (“[A]ny limitations defense—whether stemming from the arbitration agreement,
 3 arbitration association rule, or state statute—is an issue to be addressed by the arbitrators.”
 4 (emphasis in original) (citations omitted)).

5 Swain counters that an attachment to the parties’ arbitration agreement narrowly limits
 6 arbitrable issues to eight enumerated “claims, demands, and controversies,” *i.e.*, “disputes
 7 covered.”² App’x 27. He asserts that limitations issues are not arbitrable because they are not
 8 listed among these covered disputes. But Swain’s reading of the arbitration agreement and its
 9 attachment is flawed. The limitations defense asserted by Hermès is an affirmative defense
 10 growing out of a covered dispute and bearing on its final disposition; it is not itself a substantive
 11 claim. *See Howsam*, 537 U.S. at 84 (noting limitations questions were presumptively for the
 12 arbitrator, not a court, to decide). As one would expect, the “disputes covered” list does not
 13 include *any* defenses. *See* App’x 27. Clearly, the parties did not intend all defenses to be
 14 unreviewable by the arbitrator.³

15 What’s more, the arbitration agreement explicitly confers on the arbitrator the authority to
 16 “apply the governing substantive law applicable to the parties’ claims *and defenses* otherwise
 17 available in court,” which plainly covers the limitations defenses asserted by Hermès in the

² The eight enumerated “disputes covered” include “all legal and equitable claims, demands, and controversies” arising out of: (i) the terms and conditions of Swain’s employment with Hermès; (ii) any agreement between Swain and Hermès; (iii) employment policies or employee benefit plans; (iv) unfair competition, violation of trade secrets, or disclosure of confidential information; (v) alleged discrimination, harassment, or retaliation; (v) whistleblowing claims under federal, state, local, or common law; (vi) leaves of absence, benefits, compensation, or post-termination benefits under federal, state, or local law; and (vii) other foreign, federal, state or local law or regulation. App’x 27. The Court notes that the attachment mistakenly assigns romanette “(v)” to two types of covered disputes. *Id.*

³ Further supporting our reading is the fact that the “Disputes Excluded” provision of the attachment does not enumerate statute of limitations defenses (or any defenses, for that matter) among the list of *excluded* disputes. *See id.*

1 arbitration proceeding. App’x 24 (emphasis added). Resolving all doubts in favor of
2 arbitrability, this Court rejects Swain’s strained reading of the parties’ arbitration agreement and
3 its attachment as prohibiting the arbitrator from deciding limitations issues. *See Citigroup*, 776
4 F.3d at 129.

5 Swain also argues that, assuming the arbitrator had the power to decide limitations issues,
6 the arbitrator erred by refusing to equitably toll the limitations periods. But even if the
7 arbitrator’s refusal to toll was erroneous—and we see no reason to reach that conclusion—that is
8 not a basis on which to revisit the district court’s judgment confirming the award. Under the
9 Federal Arbitration Act (“FAA”), the “validity of an award is subject to attack only on those
10 grounds listed in [Section] 10, and the policy of the FAA requires that the award be enforced unless
11 one of those grounds is affirmatively shown to exist.”⁴ *Lloyds of London*, 892 F.3d at 505
12 (quoting *Wall St. Assocs. L.P. v. Becker Paribas Inc.*, 27 F.3d 845, 849 (2d Cir. 1994)). That the
13 arbitrator “committed an obvious legal error” is not among these grounds. *DiRussa v. Dean*
14 *Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997). Accordingly, the district court did not
15 err in declining to vacate, and instead confirming, the award.⁵ *Jock*, 646 F.3d at 122 (“Put simply,

⁴ Section 10 of the FAA states that a court may vacate an arbitration award where: (1) “the award was procured by corruption, fraud, or undue means”; (2) “there was evident partiality or corruption in the arbitrators”; (3) “the arbitrators were guilty of misconduct or misbehavior” in carrying out their duties; or (4) “the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a).

⁵ This Court rejects Swain’s argument that the arbitrator’s dismissal on a motion to dismiss, rather than on summary judgment, denied him his right to an “arbitration” under the arbitration agreement. The agreement here incorporates American Arbitration Association (“AAA”) rules, which expressly permit the arbitrator to consider dispositive motions. AAA Employment Arbitration Rules and Mediation Procedures R. 27. AAA Rule 27 does not exclude motions to dismiss from such permissible “dispositive motions.” *See id.*

We also reject Swain’s argument that the arbitration award should be vacated because it was rendered in “manifest disregard of the law.” *See Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451 (2d Cir. 2011). “A litigant seeking to vacate an arbitration award based on alleged manifest disregard of the law bears a heavy burden, as awards are vacated on grounds of manifest disregard only in those exceedingly rare

1 section 10(a)(4) does not permit vacatur for legal errors.” (alteration, internal quotation marks, and
2 citation omitted)).

3 **2. The District Court’s Anti-Filing Injunction**

4 Finally, Swain asserts that the district court’s anti-filing injunction, which prohibits him
5 from refileing a motion to reinstate his complaint in New Jersey state court and from filing any
6 additional lawsuits against Hermès for claims arising out of his former employment, should be
7 vacated. We review the district court’s determination to issue an injunction for abuse of
8 discretion. *See Eliahu v. Jewish Agency for Isr.*, 919 F.3d 709, 713 (2d Cir.), *cert. denied*, 140
9 S. Ct. 380 (2019). “An abuse of discretion may be found when the district court relies on clearly
10 erroneous findings of fact or on an error of law in issuing the injunction.” *In re Baldwin-United*
11 *Corp.*, 770 F.2d 328, 334 (2d Cir. 1985).

12 “In determining whether to restrict a litigant’s future ability to sue, a court must
13 consider whether a litigant who has a history of vexatious litigation is likely to continue to abuse
14 the judicial process and harass other parties.” *Eliahu*, 919 F.3d at 713–14 (internal quotation
15 marks and citation omitted). We have identified five factors to be considered in deciding whether
16 to impose an anti-filing injunction:

- 17 (1) the litigant’s history of litigation and in particular whether it entailed vexatious,
18 harassing or duplicative lawsuits; (2) the litigant’s motive in pursuing the litigation,
19 e.g., does the litigant have an objective good faith expectation of prevailing?; (3)
20 whether the litigant is represented by counsel; (4) whether the litigant has caused
21 needless expense to other parties or has posed an unnecessary burden on the courts
22 and their personnel; and (5) whether other sanctions would be adequate to protect
23 the courts and other parties.
24

instances where some egregious impropriety on the part of the arbitrator is apparent.” *Id.* Swain has not
come close to meeting that burden. His brief discussion of this argument nowhere identifies any specific
source of law that the arbitrator disregarded, and the “manifest disregard” standard does not authorize us to
vacate an arbitrator’s award based on disagreement with the arbitrator’s resolution of a legal issue.

1 *Id.* at 714 (citation omitted).

2 Here, the district court determined that the first, second, and fourth factors weighed in favor
3 of issuing the present injunction, given Swain’s history of vexatious and duplicative litigation, his
4 improper motive for pursuing the litigation, and the fact that he has inflicted needless expense on
5 Hermès and unnecessarily burdened the court system. *See Hermès of Paris, Inc. v. Swain*, No.
6 16-CV-6255, 2020 WL 5549704, at *5 (S.D.N.Y. Sept. 16, 2020). We agree with the district
7 court’s assessment as to those factors and conclude that the court did not abuse its discretion in
8 issuing the injunction.

9 As to the first factor, the district court did not err in determining that Swain has a
10 demonstrable history of vexatious and duplicative lawsuits against Hermès. Since the district
11 court compelled the parties to arbitrate in September 2016, “Swain has filed two motions to
12 reinstate his complaint in New Jersey state court, arguing repeatedly that he is entitled to litigate
13 his claims in court,” despite decisions to the contrary from this Court, the district court, the New
14 Jersey Appellate Division, and the New Jersey Superior Court. *Id.*; *see generally Swain*, 867
15 F.3d at 323; *Swain*, 2016 WL 4990340, at *1; *Swain v. Hermès of Paris*, No. A-4682-17T4, 2019
16 WL 1773293, at *3 (N.J. Super. Ct. App. Div. 2019); App’x 76.

17 Next, the district court correctly determined that Swain lacked an objective good faith
18 expectation of prevailing in the instant dispute. We thus agree with the court’s finding that
19 Swain’s “current motive in continuing to pursue a reinstatement of his state-court complaint is an
20 attempt to avoid complying with the arbitrator’s decision against him.” *Swain*, 2020 WL
21 5549704, at *5. This conclusion turns the second factor against Swain, and also the fourth, as he
22 has undoubtedly caused needless expense to Hermès and imposed an unnecessary burden on
23 federal and state courts through his repeated filings. *See Eliahu*, 919 F.3d at 715 (holding that

1 even frivolous claims, which may not be overly difficult to defend against, may require defense at
2 “not insignificant costs” and “burden[.]” the courts).

3 Having concluded that these factors weigh in favor an anti-filing injunction, we see no
4 abuse of discretion in the district court’s order enjoining Swain from refileing a motion to reinstate
5 his complaint in New Jersey state court and from filing future lawsuits against Hermès for claims
6 arising out of his former employment. We therefore affirm the district court’s issuance of an
7 injunction.⁶

8 * * *

9 We have considered Respondent-Appellant Swain’s remaining arguments and find them
10 to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

11 FOR THE COURT:
12 Catherine O’Hagan Wolfe, Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal is for the United States Second Circuit Court of Appeals, with the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" visible around the perimeter. There are small stars on either side of the "SECOND CIRCUIT" text.

⁶ At the same time, we deny Hermès’s motion to sanction Swain and his attorney, Christopher Hager. *See* 28 U.S.C. § 1927; Fed. R. App. P. 38. At oral argument, Hermès withdrew the motion as to Swain, in light of attorney Hager’s taking responsibility for the questionable litigation strategy pursued by Swain. We conclude that, at least at present, the district court’s anti-filing injunction is sufficient to address his “deviations from proper standards of conduct[,] with a view toward encouraging future compliance and deterring further violations,” the “underlying purpose of sanctions.” *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 179 (2d Cir. 2012) (citation omitted).