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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR Justice

PART 33

Index Number : 101905/2012
KASSEL, DAVID
vs.
ISSI HOLDINGS, LLC.
SEQUENCE NUMBER : 001
CONFIRM AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-10; 11-25

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). 26-28

Upon the foregoing papers, it is ordered that this motion is

See memorandum decision annexed hereto.

RECEIVED
JUL 26 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/25/12

_____, J.S.C.
ALEXANDER W. HUNTER JR

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☑ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

----------X

In the Matter of the Arbitration of Certain Controversies Between

David Kassel,

Petitioner/Cross-Respondent,

-against-

ISSI Holdings, LLC, Andrew Franzone, David Hale, and Steven Sgammato,

Respondents/Cross-Petitioners.

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Index No. 101905/12

Decision

HON. ALEXANDER W. HUNTER, JR.

The application by petitioner/cross-respondent David Kassel for an order pursuant to C.P.L.R. 7510, confirming the modified final arbitration award, and, directing judgment in favor of petitioner against respondents ISSI Holdings, LLC, Andrew Franzone, David Hale and Steven Sgammato, pursuant to C.P.L.R. 7514, is denied.

The application by respondents/cross-petitioners for an order pursuant to C.P.L.R. 7510, to confirm the award "as-is," and to have judgment entered on the modified final award of arbitration, pursuant to C.P.L.R. 7514, is granted.

On April 12, 2006, the parties to this matter entered into an operating agreement governing ISSI Holdings, LLC ("ISSI"), the company petitioner established about 50 years earlier. The operating agreement contained an agreement to arbitrate under the commercial rules of the American Arbitration Association ("AAA"). About five months after entering into the operating agreement, on September 28, 2006, petitioner and each of the individual respondents entered into individual ten-year employment agreements with ISSI. However, each of the respective employment agreements contained a provision that the agreement could be "sooner terminated pursuant to [the contract's] provisions." (Verified Petition to Confirm Arbitration Award, Exhibit E). Each employment contract also included an agreement to settle any dispute "arising out of, or relating to, the contract or its breach" by arbitration. Included in the agreement to arbitrate was a provision providing that any award rendered by the arbitration panel would be enforceable by any court with appropriate jurisdiction.

In October 2007, respondents terminated petitioner's employment without cause and demanded that he sell his 40.5 percent membership interest in ISSI to the company for $1,822,500.00, pursuant to the employment agreement. Petitioner challenged both the discharge and the sale of his membership in an arbitration hearing, now referred to as the "first arbitration." The first arbitration was held to determine the obligations that ISSI and the individual respondents had to petitioner for his equity interest in the company, and with regard to his salary and benefits for the term of his employment contract.

The first arbitration panel found that ISSI's Board of Managers had the right to terminate petitioner's employment based upon Section 4.5 of the employment agreement. As such, petitioner was required to sell his membership interest in ISSI upon the company's offer to buy the interest, and the transaction was to occur no later than August 31, 2008. It was confirmed that petitioner's interest was 40.5% and worth $1,822,500.00. However, the panel found that petitioner was entitled to his annual salary, in addition to his benefits, through December 2015. In sum, the first panel denied all of petitioner's claims, and he was required to sell his membership interest worth $1,822,500.00. On October 7, 2009, the Supreme Court of the County of New York granted respondents' motion to confirm the award of the first arbitration panel, but held that an additional arbitration was required in order to determine "the subordination terms of the note to be given to Kassel by ISSI." (Respondents/Cross-Petitioners' Opposition, Exhibit 4). On November 9, 2009, the court entered judgment on the order and "directed that a new and separate arbitration be held to determine the terms of the Promissory Note." (Respondents/Cross-Petitioners' Opposition, Exhibit 5).

On February 2, 2011, petitioner filed the demand for arbitration at issue here, referred to as the "second arbitration." He named ISSI, Andrew Franzone, David Hale and Steven Sgammato as Respondents. His request was made in order to address the "terms and conditions of a note, if any, to be delivered to [himself] in exchange for his interest in the Respondent Holding Company, in accordance with the decision of the AAA dated July 10, 2008." (Respondents/Cross-Petitioners' Opposition, Exhibit 6). An arbitration panel was formed, and on December 30, 2011, the panel issued the final award.

After a number of filings by respondent regarding clerical errors made in the final award, a modified final award was issued by the arbitration panel. The award stated, in relevant part, that on or before February 27, 2012, respondents had to execute and deliver to petitioner a promissory note in the form specified by the "Promissory Note," attached to the modified final award as Exhibit A. Respondents had to pay petitioner a principal amount of $1,096,082.00 and interest in the amount of $46,082.00. The payment that respondents had previously made to petitioner for $1,145,771.15, in compliance with the final award, would be deducted against their total obligation to petitioner. As such, the promissory note annexed to the Modified Final Award was for $772,500.00.

Petitioner's motion to confirm the arbitration award seeks to verify the payment scheme delineated in the promissory note, as well as the applicable interest rate for each quarterly payment. However, in seeking confirmation, petitioner has modified the language of the promissory note as written by the panel. The promissory note states that "the principal amount shall be payable in ten (10) equal quarterly installments, of $77,250.00, *with interest on the foregoing installments of Principal Amount only*." (Verified Petition to Confirm Arbitration Award, Exhibit A) (emphasis added). With regard to the interest rate, the promissory note states that interest will be paid "at the 'applicable federal rate' as defined in Section 1274 of the Internal Revenue Code (the 'Code') *for mid-term obligations,* commencing 31st of March, 2012 and thereafter on the last day of each quarter thereafter, until paid in full." Id. (emphasis added). The interpretation that petitioner seeks to confirm, however, states "respondents are to pay the principle amount of $77,250.00 on March 31, 2012 (pursuant to the Promissory Note in the Modified Final Award) with interest on the principal amount of $772,500.00." (Verified Petition to Confirm Arbitration Award). As for the interest, petitioner maintains that it should be paid "at

the applicable federal rate for midterm obligations, from the date of the note, using the federal date that was in effect on that date." Id.

Respondents assert that petitioner is not actually seeking confirmation of the modified final award, as he claims, but rather his own interpretation of the modified award. As such, respondents are not only asking the court to deny petitioner's motion, but cross-petitioning to confirm the modified final award "as-is". The validity of respondent's cross-petition is premised upon the fact that it was brought within one year of delivery of the award as decided by the panel, pursuant to C.P.L.R. 7510.

Cross-petitioners maintain that the permissible scope of judicial review of arbitration is extremely limited. **Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y.3d 471, 480 (2006).** They contend that if the court were to confirm the judgment as interpreted by petitioner, it would be "molding the award to conform to their sense of justice," **Id.**, which is not permitted. Cross-petitioners further state that the "narrow grounds" on which a court can vacate an arbitration award are the following, pursuant to C.P.L.R. 7511(b): "it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power," **United Fedn. of Teachers v. Board of Educ., 1 N.Y.3d 72, 79 (2003).** Respondents argue that none of the circumstances listed above are present here. Additionally, the panel's decision should only be vacated if there was a miscalculation or mistake in the award, the arbitrators dealt with an issue that they should not have, or the form of the award was "imperfect." **C.P.L.R. 7511(c).** In moving for confirmation, respondent asserts that petitioner paraphrases the language of the decision, and in doing so "blatantly misquotes and mischaracterizes the Modified Final Award and Promissory Note." (Respondents/Cross-Petitioners' Opposition).

Respondents contend that there are two primary problems with the way in which petitioner has characterized the modified final award. The first alleged misstatement made by petitioner is that the panel ordered interest to be calculated on the entire unpaid balance. Respondents read the promissory note as stating that interest need only be paid on the quarterly installment. They assert that neither the modified final award nor the promissory note contain any language implying that they must pay interest on the unpaid balance of the principal sum of $772,500.00. Respondents support their position by noting that if the panel had intended for the interest to be paid in the way petitioner suggests, then the final award and the modified final award would have required respondents to pay interest on the whole sum owed, which was $1,822,500.00, not on the unpaid balance of $1,050,000.00. The use of the word "thereon" further signifies to respondents that interest was intended to be paid on each installment, as opposed to the unpaid principal amount, which the panel directed to be paid in the case of an uncured event of default. Given this difference in language, it is evident that the panel intended for respondents to pay interest only on the quarterly installment.

The second alleged mischaracterization regards the applicable interest rate. Petitioner interprets it as fixed. He believes that the applicable federal interest rate for mid-term obligations should be set at the rate as of February 27, 2011, the date the promissory note was issued. Respondents' view is that the applicable interest rate should be applied each quarter when the monthly installment is to be paid. Respondents state that if a fixed interest rate had been intended, then it would have been included in the modified final award, or the final award. Furthermore, if the panel had intended that the interest rate be fixed, then no mechanism for calculating the interest rate each quarter would have been included in the awards.

Petitioner interprets respondents' "as-is" argument, and cross-petition, as a means for avoiding payment. He reacts to respondents' claim by explaining that the members of the second arbitration panel were disgusted by the conduct of the respondents, when they continued to advocate for their interpretation of the counterclaim. Petitioner goes on to discuss respondents' argument, maintaining that given basic finance principles, it is only logical that interest would be based on the total amount owed, which is the unpaid principal, as opposed to each quarterly payment made. With regard to the midterm rates of interest, petitioner contends that the rate of interest is determined by the IRS, and as such are fixed. Petitioner states that the January 2011 rate is applicable here, and should apply to each quarterly installment for the unpaid balance owed. This statement is based on the fact that the promissory note is dated February 27, 2011 and under government rules the rate is calculated from the prior month.

While respondents may have acted reprehensibly in the past, such behavior does not justify petitioner restating the terms of the promissory note as decided by the arbitration panel. Thus, the modified final decision of the arbitration panel should be affirmed "as-is." Even if, as petitioner contends, the terms of promissory note as written do not conform to basic finance principles, the court cannot modify an award simply because petitioner finds it irrational, as long as the arbitration panel appropriately exercised its powers. **68th Assocs. v. Vidar Constr. Corp., 90 A.D.2d 462, 462 (1st Dept. 1982).** For the court to affirm petitioner's petition would be to modify the award as decided by the panel, and given that none of the criteria listed in C.P.L.R. 7511(b) are met, such a confirmation is impermissible.

Accordingly, it is hereby

ADJUDGED that the application by petitioner/cross-respondent to confirm the modified final award is denied. Respondents/cross-petitioners' application to confirm the judgment "as-is" is granted.

Settle order and judgment on notice.

Dated: July 25, 2012

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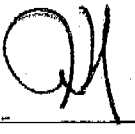

J.S.C.
ALEXANDER W. HUNTER JR