Liddle & Robinson, LLP v Finance Scholars Group, Inc.
2013 NY Slip Op 33878(U)
October 17, 2013
Sup Ct, New York County
Docket Number: 654444/12
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

----------X

LIDDLE & ROBINSON, L.L.P.,

Petitioner,

Index No. 654444/12

- against -

FINANCE SCHOLARS GROUP, INC.,

Respondent.

----------X

JOAN MADDEN, J.:

Motion sequence numbers 001, 002 and 003 are hereby consolidated for disposition. Motion sequence 001 is a petition brought by Liddle & Robinson, L.L.P. to confirm an arbitration award rendered on October 19, 2012 in Liddle & Robinson's favor against respondent Finance Scholars Group, Inc. (FSG). In motion sequence 002, FSG cross-petitions for vacatur of the award, while in motion sequence 003, both sides move to dismiss each other's petitions. The central issue in all three motions before the court is whether an arbitration award finding that a law firm was not a party to a letter agreement to hire a litigation consultant, and therefore not subject to the agreement's arbitration clause, should be set aside on the ground of "manifest disregard of the law" of contracts.

Liddle & Robinson is a law firm that was retained by two Irish corporations, Ritchie-Linked Strategies Trading and Ritchie-Linked Strategies Trading II (collectively, Ritchie), to prosecute a lawsuit in the Southern District of New York (Affirmation of Jeffrey L. Liddle dated Sept. 13, 2012 [Liddle Affirm.], ¶¶ 3-4). After Ritchie authorized

Liddle & Robinson to retain a damages expert, Jeffrey Liddle, Esq. (Liddle), the firm's managing partner, hired Professor Sheridan Titman, an economics professor at the University of Texas at Austin (*id.*, ¶¶ 5-10). Professor Titman advised that he used FSG, a Delaware company with offices in California and New York, for billing and other expert witness services (*id.*, ¶ 6). Liddle contacted FSG, and they forwarded FSG's standard engagement letter on May 28, 2010 (the Letter Agreement) (*id.*, ¶¶ 7-8). Liddle avers that he signed the Letter Agreement on behalf of Ritchie (*id.*, ¶¶ 10, 12, 13). It is undisputed that Jeffrey Andrien, the president and managing director of FSB, drafted the Letter Agreement (Affidavit of Jeffrey Andrien, sworn to on September 12, 2012 [Andrien Aff.], ¶ 3).

The Letter Agreement is addressed to Liddle at Liddle & Robinson's offices. The first sentence provides:

> It is our understanding that Liddle and Robinson ("Counsel") wishes to engage Finance Scholars Group ("FSG") on behalf of Ritchie Risk-Linked Strategies Trading, Ltd. ("Client") to provide consulting and expert witness services related to the matter referenced above.

(Letter Agreement at 1). The Letter Agreement further defines Professor Titman as "Expert." While the "Scope of Work" and "Confidentiality" sections provide that FSG's consulting services will be directed and controlled by Counsel, meaning Liddle & Robinson, the section entitled "Billing Arrangements" states, in pertinent part:

> You agree to compensate FSG for the services rendered under this agreement on the terms set forth in the enclosed 'Standard Terms,' which is incorporated into this letter by reference. . . . In the event we do not receive

> payment from you for an invoice by the due date . . . , you agree to pay any and all interest charges that become due as a result.

(*id.* at 2). The word "you" is not a defined term. After the signature of FSG's president, Jeffrey S. Andrien, the Letter Agreement concludes as follows:

> Accepted and agreed
> CLIENT NAME ***RITCHIE RISK LIMITED STRATEGIES TRADING I, AND II***
> by ***/s/*** ***May 28, 2010***
> Signature Date
> ***JEFFREY LIDDLE***
> Name (printed)

(*id.* at 4 [handwritten additions in both and italics]).

The "Standard Terms" document is two typed pages. As is relevant to this dispute, it provides that "[a]t the request of Counsel, we will provide an estimate of anticipated fees and expenses." Relative to conflicts of interest, this document provides "[i]t is possible, however, that some of our present or future clients will have disputes or other dealings with you, your clients, or related parties during the time that we are assisting you on the present matter." The Standard Terms also states that "Clients may terminate engagements with FSG at any time for any reason or no reason" on written notice to FSG. It further contains an agreement that "[a]ny controversy, dispute, or claim of whatever nature arising out of, in connection with, or in relation to the interpretation, performance, or breach of this agreement . . . shall be resolved at the request of any party to this agreement" by final and binding arbitration administered by Judicial Arbitration & Mediation Services, Inc. (JAMS).

In May 2010, FSG sent Liddle & Robinson an invoice in the amount of $118,125.43 for work it performed in April 2010 (Liddle Affirm., ¶ 14). Liddle avers that he forwarded the invoice to Ritchie, which then deposited the funds necessary to pay FSG into Liddle & Robinson's client trust account (*id.*, ¶ 16). Two days latter, Liddle & Robinson drew a check payable to FSG for the full amount of the invoice (*id.*, ¶ 17). FSG sent Liddle & Robinson a second invoice dated June 9, 2010 in the amount of $97,716.25. Liddle avers that he thought the amount billed was excessive, and told Adrien via telephone that, when the bill was provided to Ritchie, the client was going to want a justification of why the bill was so high (*id.*, ¶ 20). Liddle avers that, in January 2011, Ritchie authorized him to negotiate a cap of $200,000 on FSG's fees through the end of trial, and that FSG agreed to this cap (*id.*, ¶¶ 23-24). Liddle & Robinson contends that it received no direct benefit from the Letter Agreement, and that FSG never completed the assignment for Ritchie (*id.*, ¶¶ 26-27).

FSG filed a demand for arbitration against Liddle & Robinson with JAMS on April 10, 2012, claiming that the law firm owed FSG $81,874.57 in unpaid fees, plus interest, based on claims of breach of contract, account stated, quantum meruit and promissory estoppel. On June 26, 2012, Liddle & Robinson served a motion to dismiss the demand for arbitration, on the ground that it was not a party to the Letter Agreement, and signed only as the agent of their client, Ritchie, and thus not a proper party to the arbitration. FSG argued that it was retained directly by Liddle & Robinson, and that it

intended to structure the Letter Agreement to bind Liddle & Robinson as counsel for the prompt payment of its invoices (*see* Andrien Aff., ¶ 5). And, according to Andrien, FSG never had any contact with anyone at Ritchie regarding the Letter Agreement or payment of FSG's two invoices (*id.*, ¶ 11). He further avers that Liddle & Robinson never disclaimed or denied any responsibility for the payment of FSG's invoices (*id.*, ¶ 12).

On July 31, 2012, the JAMS arbitrator, the Hon. Stephen G. Crane, requested supplemental briefing on seven questions regarding the intent of the parties as to the identity of FSG's counterparty and their intent or not to bind Liddle & Robinson to the terms of the Letter Agreement.

The arbitrator issued a "Final Award" on October 19, 2012, after considering the supplemental submissions. Although both parties maintained that the Letter Agreement was not ambiguous, the arbitrator disagreed. He found that the language employed, particularly the inconsistent use and capitalization of defined terms, rendered the Letter Agreement ambiguous as to the identity of the counter-party (Award at 7, 17). He ruled that Andrien's testimony that he intended to bind Liddle & Robinson as a party to the terms of the Letter Agreement was merely "subjective intent [that] was never translated into language of the Letter Agreement to accomplish what he intended" (Award at 17), and thus was not competent parol evidence. He then ruled that FSG, as the drafter of the Letter Agreement, was the party responsible for its ambiguities, and thus construed in a light most favorable to Liddle & Robinson, "the conclusion is ineluctable that [FSG's]

counter-party, bound by the arbitration agreement, was Ritchie, not [Liddle & Robinson]" (*id.* at 17-18).

There is no question that the award is governed by the Federal Arbitration Act (FAA), 9 USC § § 1 *et seq.*), which mandates the enforcement of written arbitration agreements relating to transactions affecting interstate commerce (*see* 9 USC § 2; *see also Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith*, 85 NY2d 173, 180 [1995]). It is undisputed that none of the grounds for vacating an arbitration award explicitly set forth in the FAA applies here (*see* 9 USC § 10 [a]). FSG argues that the award must be vacated, because the arbitrator disregarded well-settled law regarding the interpretation of ambiguous contracts. Rather than considering and using available extrinsic evidence regarding the parties' course of dealing to resolve that ambiguity, FSG contends that the arbitrator simply construed the ambiguity against FSG as the drafter of the Letter Agreement even though both parties were sophisticated parties, and Liddle & Robinson is a law firm.

The First Department has clarified that the judicially-created "manifest disregard of the law" ground for vacating an arbitration award under the FAA is still viable, notwithstanding the Supreme Court's decision in *Hall Street Assoc., L.L.C. v Mattel, Inc.* (552 US 576, 585 [2008]) (*Cantor Fitzgerald Sec. v Refco Sec., LLC*, 83 AD3d 592, 593 [1st Dept 2011]). However, this is a very limited doctrine, that gives extreme deference to the arbitrator and is to be used in "the rare occurrences of apparent 'egregious

impropriety' on the part of the arbitrators, 'where none of the provisions of the FAA apply'" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480-481 [2006], quoting *Duferco Intl. Steel Trading v T. Klaveness Shipping A/S*, 333 F3d 383, 389 [2d Cir 2003]). "'[M]anifest disregard of the law means more than an error or misunderstanding of the applicable law'" (*Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 601 [1st Dept 2012], quoting *Matter of Roffler v Spear, Leeds & Kellogg*, 13 AD3d 308, 310 [1st Dept 2004]). "[T]he award 'should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached'" (*Wallace v Buttar*, 378 F3d 182, 190 [2d Cir 2004], quoting *Banco de Seguros del Estado v Mutual Mar. Office, Inc.*, 344 F3d 255, 260 [2d Cir 2003]).

The court concurs in the arbitrator's conclusion that the Letter Agreement is ambiguous. "A contract is ambiguous if 'on its face, it is reasonably susceptible of more than one interpretation'" (*Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010], quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). FSG maintains that it contracted directly with Liddle & Robinson, since the Letter Agreement is addressed to the latter, not Ritchie, and because the word "you" in the "Billing Arrangements" section was meant to and can only refer to Liddle & Robinson, which was directly responsible for supervising and directing FSG. However, it is equally plausible, as Liddle & Robinson contends, that references in the Letter Agreement to "you" and "your" referred only to Liddle & Robinson on behalf of Ritchie and that the law firm was

merely acting as the agent for a disclosed principal.

The key issue is whether the arbitrator misapplied the law of contracts when he construed the ambiguity against FSG, as the admitted drafter of the Letter Agreement. FSG argues that this rule of construction does not apply when there is parol evidence of the parties' course of dealing or when both parties are sophisticated business entities.

Turning first to the latter contention, several courts have refused to apply this rule of construction in a contest between two insurance companies (*see Rodless Props., L.P. v Westchester Fire Ins. Co.*, 40 AD3d 253, 254 [1st Dept 2007]; *Standard Mar. Ins. Co. v Federal Ins. Co.*, 39 AD2d 444, 446 [1st Dept 1972]; *see also United States Fire Ins. Co. v. General Reins. Corp.*, 949 F2d 569, 573 [2d Cir 1991]). Nevertheless, this rule of construction is not limited to insurance agreements (*see Matter of KSI Rockville v Eichengrum*, 305 AD2d 681, 682 [2d Dept 2003]; *BT Commercial Corp. v Blum*, 175 AD2d 43, 44 [1st Dept 1991]), and has been held to apply even if both parties are considered sophisticated (*see Town of Hempstead v Incorporated Vil. of Rockville Ctr.*, 278 AD2d 308, 311 [2d Dept 2000] [two municipalities]; *Barclay Knitwear Co. v King'swear Enters.*, 141 AD2d 241, 246-247 [1st Dept 1988] [two commercial banks]).

Contrary to FSG's argument, the arbitrator did not ignore key parol evidence as to the parties' course of dealing, namely that FSG sent the invoices to Liddle & Robinson directly, and the law firm paid the first invoice with its own check and then negotiated a $200,000 cap after receiving the second invoice. Rather, the arbitrator specifically cited

all of this evidence in his decision (*see* Award at 4). In addition, Liddle's testimony regarding the payment of the first invoice after receipt of the funds from Ritchie and his discussions with Andrien regarding the second invoice, tempers much of its probative value. Nor is there any dispute that the ultimate recipient of FSG's services was Ritchie (*see* Award at 16). Finally, FSG's reliance on *Air Tiger Express (USA) v. Farrell Forwarding Corp*, 203 AD2d 500 (2nd Dept 1994) is misplaced, as that decision involves issues of agency, particularly when an agent is liable for a disclosed principal, which are not raised in this proceeding.

The court therefore concludes that since there is more than just a "barely colorable justification" for the arbitrator's ruling that Liddle & Robinson was not bound by the terms of the mandatory arbitration provision of the Letter Agreement, which is the sole issue the arbitrator considered (*see* Award at 12, 19), the award must be confirmed.

Accordingly, it is

ORDERED AND ADJUDGED that the petition (seq. no. 001) is granted, the cross-petition (seq. no. 002) is denied, and the JAMS arbitration award dated October 19, 2012 rendered in favor of petitioner Liddle & Robinson, L.L.P. and against respondent Finance Scholars Group, Inc. is hereby confirmed; and it is further

ORDERED that petitioner's motion to dismiss the cross petition and respondent's motion to dismiss the petition are both denied (seq. no. 003); and it is further

ORDERED AND ADJUDGED that petitioner Liddle & Robinson L.L.P., having an address at 800 Third Avenue, 8th Floor, New York, NY 10022, do recover from respondent Finance Scholars Group, Inc., having an address at 405 Lexington Avenue, 26th Floor, New York, NY 10174, costs and disbursements in the amount of $_____, as taxed by the Clerk upon submission of an appropriate bill of costs, and that petitioner shall have execution therefor.

Dated: October 17, 2013

ENTER:

_____
J.S.C.

_____
Clerk

12 654444

U N F I L E D J U D G M E N T
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.