Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.
2013 NY Slip Op 32838(U)
January 2, 2013
Supreme Court, New York County
Docket Number: 108641/08
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Branstin, J. PART 3
Justice

Index Number : 108641/2008
EDGEWATER GROWTH CAPITAL
vs
GREENSTAR NORTH AMERICA
Sequence Number : 004
CONFIRM AWARD

INDEX NO. 108641/08
MOTION DATE 9/10/12
MOTION SEQ. NO. 4

The following papers, numbered 1 to 3, were read on this motion to/for confirm award and for sanctions

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1
Answering Affidavits — Exhibits No(s). 2
Replying Affidavits No(s). 3

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1-2-13

Eileen Bransten J.S.C.

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 3

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EDGEWATER GROWTH CAPITAL PARTNERS, L.P, EDGEWATER IV MANAGEMENT, LLC, BEAR HOLDINGS, LLC, JZ EQUITY PARTNERS PLC, BRIAN MENG, PHILLIP B. ROONEY, and JAMES A. GORDON,

Plaintiffs,

-against-

Index No. 108641/08
Motion Date: 9/10/12
Motion Seq. No.: 004, 007

GREENSTAR NORTH AMERICA HOLDINGS, INC.,

Defendant.

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BRANSTEN, J.:

In a previous decision, this Court compelled the parties in this action to proceed to arbitration. On February 1, 2012, a three-person arbitration panel rendered a final award and decision (the "Award") in favor of defendant Greenstar North America Holdings, Inc. ("Greenstar"), and required plaintiffs to pay Greenstar $4,386,405.00 in damages.

Motion Sequence Nos. 004 and 007 are now before the Court and stem from this Award. In Motion Sequence No. 004, defendant Greenstar moves, pursuant to CPLR 7510, for an order: (1) confirming the Award; (2) entering a judgment enforcing the Award; and (3) granting Greenstar an award of its attorney's fees and costs resulting from its preparation and filing of this motion.

In Motion Sequence No. 007, plaintiffs Edgewater Growth Capital Partners, L.P. ("Edgewater"), Edgewater IV Management LLC, Bear Holdings, LLC ("Bear Holdings"), JZ Equity Partners PLC ("JZ"), Brian Meng, Philip B. Rooney and James A. Gordon seek to vacate the Award.

For the reasons set forth below, plaintiffs' motion to vacate the Award is denied, defendant's motion to confirm the Award is granted, and defendant's motion for sanctions is denied.

BACKGROUND

The facts of this matter have been discussed extensively in the Court's previous decision in this matter. Thus, only the details necessary to the instant motions are referenced herein.

On October 3, 2007, Greenstar entered in an Agreement for Purchase and Sale of All Outstanding Capital Stock of Recycled Holdings Corporation (the "APA") with plaintiffs Edgewater, Bear Holdings, JZ, Meng and Rooney (collectively, the "Sellers"). In the negotiations leading up the APA, the Sellers stressed the importance of a license and a supply agreement for sale of recyclable materials to the Wing Fat Company ("Wing Fat") in China (the "Supply Agreement"). The material terms of the

proposed Supply Agreement were contained in a Letter of Intent (the "LOI") that was ultimately attached to the APA.

When it became clear that the Sellers could not finalize the license and Supply Agreement prior to the execution of the APA, Greenstar and the Sellers added Section 2.6 to the APA "to protect the Buyer" (Greenstar) in the event that the Sellers could not fully deliver the promised license. Section 2.6 detailed the agreed-upon terms of the license and the Supply Agreement, when they were to be delivered, and how any claim for damages related to the China transaction (the "China Damages Claim") was to be valued. Section 2.6 also specifically stated that Greenstar would be harmed if the Sellers did not enter into the Supply Agreement on terms that were "substantially the same or more beneficial" than the terms included in the LOI. It also included a dispute resolution provision, which provided that any disputes regarding the China Damages Claim were to be submitted to arbitration (the "Dispute Resolution Agreement").

The Sellers did not provide the agreed-upon license and Supply Agreement on a timely basis, and Greenstar contends that the Supply Agreement was not substantially the same or more beneficial than the one promised in the LOI. After Greenstar notified plaintiffs of its claim for damages under the Dispute Resolution Agreement, plaintiffs filed this action, instead of submitting to the arbitration procedure. Plaintiffs argued to the Court that the dispute fell outside the scope of the Dispute

Resolution Agreement, because, under New York Law, Section 2.6(d) was an "Appraisal" clause, not an "Arbitration" clause. Under plaintiffs' interpretation of the APA, Section 2.6(d) resolved only the valuation of Greenstar's damages, and left all other issues for resolution at a plenary trial.

Greenstar moved to compel arbitration pursuant to the Federal Arbitration Act, as well as CPLR 7503 and 3211. In deciding the motion to compel, this Court rejected plaintiffs' arguments, holding that "[n]owhere does section 2.6(d) limit the authority of the arbitrator or clearly limit the issues simply to mathematics," and ordered the parties to arbitrate the dispute. (4/16/09 Decision at 10.)

In November 2010, arbitrators were empaneled to hear the dispute. In accordance with the Dispute Resolution Agreement, the parties entered into an agreement on arbitration procedure. (the "Arbitration Procedures Agreement") This time-consuming and fact-intensive procedure included: (1) months of discovery, in which the parties exchanged thousands of documents; (2) six depositions; (3) four rounds of pre-arbitration briefing; (4) a two-day arbitration hearing featuring the testimony of seven fact witnesses; (5) a telephone interview of a witness not present at the arbitration, conducted by the Panel; and (6) post-arbitration briefing in which the parties summarized the evidence presented and their positions.

On February 1, 2012, the Panel rendered the Award, finding that Greenstar was damaged by plaintiffs' failure to obtain a Supply Agreement with terms substantially the same as those referenced in the APA. *See* the Award (2/9/12 Affirmation of Jay G. Safer ("Safer Affirm."), Ex. 7.) The Panel determined that: (1) plaintiffs were liable to Greenstar in the amount of $4,059,864.00; (2) Sellers (defined by the Arbitration Panel as all the Plaintiffs) were liable under the APA for Greenstar's portion of the Panel's fees; and, (3) the full amount of damages for which Sellers were responsible was $4,386,405.00.

Greenstar seeks enforcement of the Award, but plaintiffs deny all responsibility for damages and reserve all defenses.

DISCUSSION

I. Standard of Law

CPLR 7510 provides that "[t]he court shall confirm an [arbitration] award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." Under New York law, arbitration awards are entitled to "substantial deference," and are subject to extremely limited judicial review. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 475 (2006); *Matter of Uram v. Garfinkel*, 16 A.D.3d 347, 348 (1st Dep't 2005), *lv*

denied 5 N.Y.3d 717 (2005); *see Paulson Inv. Co. v. Almodovar*, 2005 WL 323737, at *1 (S.D.N.Y. 2005) ("Confirmation of an arbitration award under Section 9 of the FAA ... is 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the Court'") (citation omitted). Thus, an arbitration award will be upheld so long as there is "'even a barely colorable justification for the outcome reached.'" *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d at 479 (quoting *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 704 (2d Cir. 1978)); *see also Barclays Capital Inc. v. Shen*, 20 Misc.3d 319, 321 (Sup. Ct. N.Y. Cty 2008). Absent extremely narrow exceptions, arbitration awards must be confirmed. *See* CPLR §§ 7510-7511.

The showing required to avoid summary confirmation of an arbitration award is very high. CPLR 7511(b); *Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997); *see also Matter of Engel (Refco, Inc.)*, 193 Misc.2d 91, 105 (Sup. Ct. N.Y. Cty 2002) (citation omitted) (noting that the standard for review of arbitration is "'among the narrowest known to law'"). Courts may not vacate arbitration awards on the basis of factual or legal errors, unless those errors are "'so gross or palpable as to establish fraud or misconduct'" *Dahan v. Luchs*, 92 A.D.2d 537, 538 (2d Dep't 1983) (citation omitted). Indeed, an arbitration award may only be vacated if "it is violative of a strong public policy, or is totally irrational, or exceeds a

specifically enumerated limitation on [the arbitrator's] power." *Matter of Silverman (Benmor Coats, Inc.)*, 61 N.Y.2d 299, 308 (1984). A decision is irrational, and subject to judicial oversight, only if it the record contains no proof to justify the award. *Matter of Eastman Assocs., Inc. (Juan Ortoo Holdings, Ltd.)*, 90 A.D.3d 1284 (3d Dep't 2011).

II. **Plaintiffs' Arguments**

Plaintiffs make several arguments in opposition to defendant's motion to confirm and in support of their own motion to vacate, each attacking the validity of the Award. Plaintiffs contend that: (1) the Arbitration was not really an arbitration, but rather, merely an appraisal of damages; (2) that the damages awarded to defendant by the Panel were invalid since the parties' agreement limits defendant's recovery to escrow funds; (3) that since defendant's recovery is limited to escrow funds, the prior release of the escrow funds rendered the arbitration moot; (4) that the Panel made errors rendering the Award "irrational"; and, (5) that the Award did not render damages against plaintiffs individually, and to the extent it did, the Panel did not have the authority to do so. Each of these arguments will be addressed in turn.

A. Plaintiffs' Contention that the Arbitration was an "Appraisal"

Plaintiffs maintain that Section 2.6(d) is a "narrow damages valuation clause," and as such, the decision rendered by the Panel under that Section is simply an appraisal, not an "award" that can be "confirmed" by this Court. In support of this theory, plaintiffs differentiate between appraisals and arbitrations by arguing that appraisals address only valuation of damages, while arbitrations also address liability. Plaintiffs contend that the Panel did not address liability, and that thus, the Panel's authority was limited to valuing Greenstar's theoretical damages.

The Court rejects this argument. Under Section 2.6(d) of the APA, Greenstar was entitled to damages if it was harmed. "Harm" is distinct from damages in this context. The question of whether Greenstar was harmed was the threshold question in this case, and the Panel addressed it, and ruled on it. This is clearly demonstrated by the Award, which not only explicitly states that Greenstar was "harmed," but also captions the section in which it calculates Greenstar's damages as "Liability and Damages. *See* Award at 3, 5. In this "Liability and Damages" section, the Panel states that:

> The Panel rules Greenstar has been harmed and has calculated a Final China Damage Claim of $4,059,864.

Id. at 6. Thus, the Award demonstrates that liability was considered by the Panel, in addition to damages.

Plaintiff also argues that the Award was not an award, but rather, merely a "damages valuation." To the contrary, the Panel explicitly identified its decision as an award, stating that:

> either Party may use the Panel's decision for the purpose of having it confirmed with a court of law and turned into a judgment, should that be necessary to enforce the award.

Id. at 2.

Moreover, plaintiffs already argued before this Court that the Arbitration was merely an appraisal, or "damage calculation mechanism," and both this court and the Appellate Division have rejected this argument. *See Edgewater Growth Capital Partners, L.P. v. Greenstar N. Am. Holdings, Inc.*, 69 A.D.3d 439 (1st Dep't 2010); 4/19/09 Decision at 9-10. Under New York law, these decisions are binding law of the case, and may not be relitigated now.

At the beginning of this action, plaintiff argued that Section 2.6(d) was an "'Appraisal' clause, not an 'Arbitration' clause and that this Court, not an 'Accounting Firm' [was] given the responsibility to determine whether a claim for damages exists." *See* 2/27/12 Reply Affirmation of Jay G. Safer ("2/27/12 Safer Reply Affirm."), Ex. A

(Plaintiffs' Memorandum of Law In Opposition to Motion to Compel Arbitration at 6, 14). This Court explicitly rejected this reading of Section 2.6(d):

> The parties elected a procedure where by they would submit detailed statements to the arbitrator(s) who are then to 'decide upon matters on which there is a substantive dispute.' Nowhere does Section 2.6(d) limit the authority of the arbitrator or clearly limit the issue simply to mathematics. To the extent that Edgewater believes there have been no damages, it can make that argument to the arbitrator(s) and it can value the China Damage Claim at zero.

(4/16/09 Decision, at 9-10.) Following the Court's determination of this issue, plaintiffs appealed to the Appellate Division. The First Department panel found that the "unambiguous language of section 2.6(d) of the purchase agreement constituted a broad arbitration clause," and upheld this court's decision ordering the parties to arbitration. *Edgewater*, 69 A.D.3d at 439.

The purpose of the law of the case doctrine is to prevent relitigation of legal issues that have already been determined at an earlier stage of the proceeding. *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975); *Brownrigg v. New York City Hous. Auth.*, 29 A.D.3d 721, 722 (2d Dep't 2006). Thus, "once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by Judges or courts of co-ordinate jurisdiction in the course of the same litigation." *Holloway v. Cha Cha Laundry*, 97 A.D.2d 385, 386 (1st Dep't 1983). In addition, an appellate court's resolution of an issue

on prior appeal constitutes law of the case, and is binding on the Supreme Court, as well on appellate courts. *See J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 A.D.3d 809, at *2 (2d Dep't 2007); *see also Johnson v. Incorporated Vill. of Freeport*, 288 A.D.2d 269, 269 (2d Dep't 2001).

Plaintiffs' current argument, that Section 2.6(d) is a "Narrow Damages Valuation" clause that does not authorize the Panel to issue an award, is identical in both structure and significance to plaintiffs' prior appraisal argument. It is also directly contrary to the rulings of this court and the Appellate Division, in contravention of the law of the case doctrine. Plaintiffs' argument has been rejected once by the Court and by the Appellate Division. It cannot be relitigated now to attack the arbitration award.

B. Plaintiffs' Sole and Exclusive Remedy Argument

Plaintiffs further attack the validity of the Award by arguing that Section 2.6 precludes defendant's ability to recover damages directly from plaintiffs. Instead, plaintiffs contend that damages under the Section 2.6 are limited to an escrow fund, created for this purpose, and as such, the Award is invalid to the extent it finds that defendant is entitled to any other damages. Accordingly, plaintiffs argue that the arbitration is moot because the escrow fund has been released, and no further recovery is available for defendant.

The Court rejects this argument. Plaintiffs had an opportunity to assert this escrow fund exclusive remedy argument when they were before this Court disputing the arbitrability of Greenstar's claim. They chose not to do, instead opting to have the issue decided by the Panel. In doing so, plaintiffs admitted the Panel's authority to decide the question, and waived any argument that the Panel acted beyond the scope of its authority in ruling as it did.

Moreover, in issuing the Award, the Panel explicitly considered and rejected plaintiffs' argument that Greenstar's recovery was limited to the contents of the escrow account. In their initial brief before the Arbitration Panel, plaintiffs argued that Greenstar's recovery was barred due to the disbursement of the escrow account referenced in Section 2.6(d). The Panel rejected this argument, ruling that "Greenstar has the right to pursue damages through the arbitration process set forth in the APS, even though the escrow agent released the escrow funds to Edgewater in October 2008." (2/27/12 Safer Reply Affirm., Ex. E.) Thus, plaintiffs have already obtained an arbitration ruling on the escrow issue and point to no facts or law to meet the high threshold required to disturb such a finding here.

Further, contrary to plaintiffs' arguments, the language of Section 2.6 does not limit Greenstar's recovery to the contents of the escrow account. Indeed, Section 2.6(b) explicitly states that the escrow account is intended to "partially protect" Greenstar

from the risk that plaintiffs might fail to deliver on their promise. This language clearly demonstrates that the escrow account was not intended to be Greenstar's sole source of recovery.

In *Rochester City School Dist. v Rochester Teachers Assn.*, the Court of Appeals considered a substantially similar question. There, the parties submitted a question of contract interpretation to an arbitrator. Following the arbitrator's ruling, the Rochester City School District appealed, claiming that the arbitrator's decision was contrary to the unambiguous language of the contract, and that the arbitrator therefore "exceeded his power" by ruling as he did. 41 N.Y.2d 578 (1977).

The Court of Appeals rejected this argument, holding:

> A party who has participated in arbitration cannot later seek to vacate the award on the ground that the controversy was not arbitrable. By statute that question must be raised before arbitration, and if is not it is deemed to be waived. Obviously a party may not avoid this restriction by later arguing that the award should be vacated on the ground that the arbitrator 'exceeded his power' by construing the agreement when it was clear on its face and required no interpretation.

Id. at 583 (internal citations omitted).

Likewise, here, if plaintiffs believed that Section 2.6(d) was an unambiguous provision limiting Greenstar's right to recovery, and "rendering the Arbitration moot," they should have raised this issue in their pre-arbitration action before

this court. Plaintiffs failed to do so, and decided to arbitrate the issue, stating in their Opening Statement in Rebuttal submitted to the Panel:

> For some time, Respondents have looked forward to a decision settling the proper forum for this dispute to be heard so their argument–that Greenstar has no source from which to recover–can finally be heard. With the Court determining that the proper forum is this arbitration, Respondents hereby request that the Panel consider their argument and dismiss Greenstar's claim on this basis

(2/27/12 Safer Reply Affirm, Ex. C, at 20.)

Thus, because plaintiffs submitted the escrow question to arbitration, they subjected themselves to the Panel's authority on this issue, and waived any argument that the decision exceeded the Panel's power. Having decided to arbitrate the escrow issue, rather than raising it before this court in their pre-arbitration motions, plaintiffs are barred from asserting it now.

C. Plaintiffs' Contention that the Award is "Irrational"

In seeking to vacate the Award, plaintiffs also contend that the Award was irrational. Plaintiffs assert two principal arguments: (1) that the Panel's failure to consider certain "external factors" in its damages calculation was irrational; and, (2) that the arbitrators "did not consider" plaintiffs' defenses.

With respect to plaintiffs' first claim, Section 2.6(d) required that Greenstar's damages be calculated as to the difference between what Greenstar was promised, and what it received. Section 2.6(d) lists the factors that the Panel was authorized to consider in determining the size of Greenstar's refund. Plaintiffs claim that the Panel misinterpreted these factors by excluding consideration of external or subsequent factors, impermissibly creating a "guarantee" that did not exist. Plaintiffs claim that, in doing so, the Panel "totally rewrote the provision." (Plaintiffs' Memorandum of Law in Support of Application to Vacate ("Pls.' Memo.") at 34.)

The court rejects this argument. Section 2.6(d) bases Greenstar's damages on the difference between the contract promised and the one delivered, just as the Panel held. Further, even if plaintiffs could prove that the Panel's interpretation of the APA was incorrect, they would not be able to prove that the Award was irrational unless there was no basis in the record for the Panel's decision. *See Matter of Eastman Assoc., Inc.*, 90 A.D.3d at 1284. Plaintiffs cannot meet that burden.

Each of the five factors identified in Section 2.6(d) relates to a promise made by plaintiffs that, if broken, would damage Greenstar:

> In determining the appropriate amount of the China Damage Claim, the Parties shall consider (i) the impact of delays in terms of lost earnings; (ii) changes in pricing, (iii) changes in tonnage, (iv) related costs to the Company under the arrangement, and (v) any other matters that could adversely

> impact the value of the business contemplated by the Letter of Intent.

(APA, § 2.6(d)).

The Panel found that:

> Edgewater asserts that [subsection (v)] covers the external factors that would have precluded Greenstar from fully performing even if it had received a Supply Agreement with substantially the same terms as the Letter of Intent. The Panel disagrees with this assertion. Under its interpretation of the Purchase Agreement and considering the evidence presented, the Panel believes this fifth factor was specifically intended to take into account the difference between the terms of the Letter of Intent and Supply Agreement that were *not* related to the aforementioned Section [2.6 (d)] items regarding delays, pricing, tonnage, or additional costs.

(Award at 5) (emphasis in original.)

This court finds that this determination was not irrational, and that there was ample support in both the record and the law to reach this determination. The first four factors expressly identify the most likely source of damages caused by plaintiffs' failure to meet their obligations. The fifth factor imposes liability on plaintiffs for "any other matters that could adversely impact the value of the business relationship contemplated by the Letter of Intent." Given its context, this provision was obviously intended to encompass the remainder of the Letter of Intent, allowing Greenstar's

damages to be based on any other provision in the Letter of Intent, rather than merely on the sources of damages enumerated in § 2.6(d)(ii) and (iii).

According to the contractual interpretation principal of *ejusdem generis*, "the meaning of a word in a series of words is determined 'by the company it keeps,'" *242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.*, 31 A.D.3d 100, 193-104 (1st Dep't 2006), when a general provision follows a series of specific provisions, the general provision is interpreted as being of the same type or class as the specific provisions that preceded it. *See Innophos, Inc. v. Rhodia, S.A.*, 38 A.D.3d 368, 372 (1st Dep't 2007).

In this case, the general provision, Section 2.6(d)(v), is preceded by a series of specific provisions relating to the promises that plaintiffs made regarding the business relationship contemplated by the LOI. Plaintiffs cannot rely on the specific provision to bring in an entirely new class of data.

Thus, the Panel correctly rejected plaintiffs' position that Section 2.6(d)(v) "covers the external factors that would have precluded Greenstar from fully performing even if it had received a Supply Agreement with substantially the same terms as the Letter of Intent." (Pls.' Memo., at 24.) Thus, contrary to plaintiffs' argument, the Award is a rational interpretation of the contract.

With respect to plaintiffs' argument that the Panel failed to consider all of their defenses, plaintiffs cite five pieces of evidence that they claim should have

persuaded the Panel to decide the arbitration in their favor: (1) Greenstar could not meet Wing Fat's orders in a timely manner; (2) the global shipping container crisis; (3) Greenstar's actual profit margin; (4) Greenstar's failure to use "commercial reasonable efforts" to foster the Wing Fat relationship; and, (5) the removal of the "exclusivity" term at Greenstar's instruction.

Contrary to plaintiffs' argument, of the five defenses that plaintiffs claim that the Panel failed to consider, four are explicitly referenced and refuted in the Panel's decision. *See* Award at 4-5 (describing some of the arguments that the Panel considered, including plaintiffs' arguments regarding Greenstar's purported instruction to remove the exclusivity term, Greenstar's purported inability to get sufficient shipping containers to meet Wing Fat's orders, Greenstar's purported inability to timely fill Wing Fat's order, and Greenstar's purported abandonment of the Wing Fat relationship).

Plaintiff's fifth defense – evidence regarding Greenstar's profit margins – also appears to have been considered fully by the Panel. The Panel did not invent the $4.99 margin that plaintiffs now claim is unreasonable. *See* Award at 4. The parties briefed and argued the issue extensively. Plaintiffs argued that a negative $0.08 margin was an appropriate measure of Greenstar's damages. Greenstar argued that the appropriate measure of damages was the profit margin that Greenstar could reasonably have expected based upon the terms of the LOI. Greenstar witnesses testified that a $4.99

margin was a conservative estimate of this expectation. Ultimately, the Panel adopted the $4.99 margin advocated by Greenstar. Thus, it clearly heard and considered both plaintiffs' and Greenstar's arguments, and rejected plaintiffs' arguments in favor of those of Greenstar.

Each of plaintiffs' defenses was raised during the arbitration, and countered by Greenstar's evidence and arguments. Consequently, there is a rational basis for the Panel's decision.

In any event, even if the arbitrators had failed to consider all of plaintiffs' defenses, it would not support vacatur of the Award. *See Matter of Grynberg v. BP Exploration Operating Co. Ltd.*, 92 A.D.3d 547, 547-48 (1st Dep't 2012) (holding arbitrator's refusal to hear expert testimony did not warrant vacatur of the award where the arbitrator's factual determinations rendered such evidence moot). In this situation, "[t]he court's only concern is that, after a hearing in which both sides have had a fair opportunity to be heard, the dispute submitted to the arbitrator be finally and definitely resolved by him in a manner that bears some rational relationship to the parties' contract." *Matter of Guetta (Raxon Fabrics Corp.)*, 123 A.D.2d 40, 44-45 (1st Dep't 1987). Here, plaintiffs have failed to demonstrate that they lacked an opportunity to be heard or that the Panel's ruling lacked a rational relationship to the parties' contract.

D. Plaintiffs' Argument that Damages Cannot Be Enforced Against Plaintiffs Individually

Plaintiffs' final argument is the Award did not specifically assess damages as to plaintiffs individually; therefore, any attempt by defendant to enforce the Award as to each plaintiff is improper. Moreover, to the extent that Award could be construed as holding plaintiffs jointly and severally liable, such a construction would be improper, as outside the bounds of the arbitration provision.

Moreover, New York law supports the Panel's decision to hold plaintiffs jointly and severally liable for Greenstar's damages. Under New York law, contractual rights and responsibilities are presumed to be joint unless the contract includes severing language. *United States Print. & Lithograph Co. v. Powers*, 233 N.Y.143, 152 (1922). Section 2.6(d) contains no such limiting language. Therefore, plaintiff's obligations under Section 2.6 were joint, and the Panel was authorized to find them jointly and severally liable. *See e.g.*, *Wujin Nanxiashu Secant Factory v. Ti-Well Intl. Corp.*, 22 A.D.3d 308 (1st Dep't 2005), *lv denied* 7 N.Y.3d 703 (2006) (holding that, since contract contained no limiting language that could overcome presumption of joint liability, agent who signed contract was personally liable).

III. **Defendant's Motion to Confirm the Award and Motion for Sanctions**

CPLR § 7510 provides that the court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." New York courts have held that an arbitration award will be upheld so long as there is "'even a barely colorable justification for the outcome reached.'" *See, e.g., Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d at 479. For the reasons discussed above, the Court finds that the Award provides sufficient justification for the outcome reached. Accordingly, since there was clearly a rational basis for the Award, the Award is confirmed.

However, Greenstar's motion for an award of sanctions in the form of its costs and attorney's fees resulting from the preparation and filing of this motion is denied. The imposition of sanctions is not appropriate here, as there is no indication that plaintiffs' motion is completely frivolous and without merit. *See Grossman v Pendant Realty Corp.*, 221 A.D.2d 240, 241 (1st Dep't 1995), *lv dismissed* 88 N.Y.2d 919 (1996); *North Am. Van Lines, Inc. v Am. Intl. Cos.*, 11 Misc.3d 1076[A], at *4 (Sup. Ct. N.Y. Cty 2006), *affd* 38 A.D.3d 450 (1st Dep't 2007).

The court has considered the remaining arguments, and finds them to be without merit.

CONCLUSION

Accordingly, it is

ORDERED that defendant's motion to confirm the arbitration award (Motion Sequence No. 004) is granted; and it is further

ORDERED that defendant's motion for the imposition of sanctions (Motion Sequence No. 004) is denied; and it is further

ORDERED that plaintiffs' motion to vacate the arbitration award (Motion Sequence No. 007) is denied as moot; and it is further

ORDERED that the arbitration award is confirmed.

Dated: New York, New York
January 2, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.