

Field v BDO USA LLP
2014 NY Slip Op 33956(U)
November 20, 2014
Supreme Court, New York County
Docket Number: 600010/2010
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : LAS PART 39

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DENIS M. FIELD,

Petitioner,

-against-

Index No. 600010/2010

BDO USA LLP (FORMERLY BDO SEIDMAN LLP),

DECISION AND ORDER

Respondent.

-----X
HON. SALIANN SCARPULLA, J.:

In this proceeding, petitioner Denis M. Field ("Field") moves to renew his petition to vacate the arbitration award dated July 17, 2012 issued in *Field v. BDO USA, LLP*, JAMS Case No. 142007120.

FILED
NOV 25 2014

The facts are incorporated as stated in the decision/order of this court (Hon. Sal. J.) filed July 22, 2013, which granted respondent BDO USA LLP's ("BDO") motion to dismiss Field's petition to vacate the July 17, 2012 arbitration award.

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NEW YORK

Field was the former CEO of BDO. In late 2013, after a federal criminal trial, he was acquitted of all criminal charges asserted against him arising from his behavior and actions taken in connection with tax shelters created for clients by BDO's Tax Solutions Group. He incurred millions of dollars in attorneys fees.

BDO had a policy of paying its current and former partners' legal fees if they became involved in litigation by virtue of their service at BDO. In 2004, Field, who had agreed to resign as BDO's CEO, entered into a settlement agreement with BDO to

indemnify his legal fees, and from 2005-2007, BDO paid the legal fees incurred by Field for the defense of the criminal charges asserted against him. Then, in April 2008, BDO informed Field that it would cap payments of fees for 2008 and 2009, and in January 2010, BDO stopped paying the legal fees altogether. BDO disputed that it had any responsibility to pay Field's legal fees because it believed that Field engaged in improper behavior contrary to BDO's best interests. Specifically, BDO alleged that in 2007, it discovered a 2001 draft memorandum written by Skadden, Arps, a law firm hired by BDO to review the practices and procedures of its tax solutions business, which identified possible legal concerns and negative IRS reactions to those practices and procedures. According to BDO, Field was aware of and neglected to disclose that information to BDO, and extensively edited that draft memorandum to remove the possible legal concerns and negative IRS reactions before presenting it to BDO. BDO's discovery of the memorandum in 2007 prompted its decision to discontinue payments to Field.

In April 2010, Field served BDO with a demand for arbitration. The arbitration hearing was conducted on June 25, 2012, and was non-evidentiary, as agreed upon by the parties. However, the parties were permitted to make presentations in support of their positions, and to submit pre- and post-hearing briefs.

One of the main issues posed at the arbitration was the meaning of the term "to the extent required by New York and federal law," as set forth in the indemnification provision of the parties' 2004 settlement agreement. In the July 17, 2012 arbitration

award, the arbitrator found that the indemnification provision was governed by New York Partnership Law and that the partnership "must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business..." The arbitrator held, "to be successful on his claim for indemnity, [Field] must allege and prove by a preponderance of the evidence that the work he did relating to the tax shelters was ordinary and proper." The arbitrator found that Field "has not sought to do so."

The arbitrator further held,

There is disagreement about the extent of what BDO knew about the alleged misconduct prior to entering into the settlement agreement. It appears that Judge Pauley in deciding a motion in the criminal case relying on factual submissions determined that the discovery in 2007 of the drafts of an outside law firm's opinion letter that were extensively edited prior to being shown to BDO's board was a principal factor in the deterioration of the relationship between Mr. Field and BDO. Thus, even if the conduct prior to the signing of the settlement agreement is off limits, post signing discoveries would not be. However, Mr. Field has not cited any case that holds that an indemnitee is relieved of any burden to show that his conduct was proper and ordinary because the indemnitor knew about the conduct before granting the indemnity.

Field then commenced a proceeding to vacate the arbitration award. In a decision/order filed July 22, 2013, this court (Kapnick, J.) granted BDO's motion to dismiss Field's petition.

Field now moves to renew his petition to vacate the arbitration award, arguing that the arbitration award was procured through fraud. Field maintains that in 2013, during the course of his criminal trial, he discovered the 2011 deposition testimony of Leland

Graul ("Graul"), who in 2000 was a member of BDO's risk management committee. Graul's deposition testimony was from a separate action BDO had commenced against Morgan, Lewis & Bockius, LLP, to which Field was not a party ("MLB action"). Field only became aware of the deposition testimony during his criminal trial, through a subpoena issued to BDO's general counsel at the time, Mr. Univer.

According to Field, Graul's testimony, in effect, demonstrated that BDO's risk management committee had been shown a copy of the subject draft memorandum in 2000 or 2001, several years before BDO decided to stop indemnifying Field's legal fees. As such, BDO's claim that Field wrongfully concealed the draft memorandum from BDO and extensively edited it, which precipitated BDO's decision to stop indemnifying Field's legal fees, was false and inconsistent with Graul's testimony that the memo was disclosed. Field contends that BDO misled the arbitrator and withheld the Graul deposition testimony, which it was aware of, having represented BDO in the proceeding that yielded that testimony. Field claims that he was reasonably justified in failing to present these facts previously because he had no way of knowing that the testimony existed.

In opposition, BDO argues that (1) Field's counsel had access to Graul's testimony as early as June 2012, yet only filed the current motion in 2014; (2) BDO provided the arbitrator and Field's counsel with a copy of a summary judgment decision in the MLB action, which fully disclosed that depositions had been taken in the MLB action and

referenced the subject draft memorandum; (3) Graul did not definitively testify that he saw the subject draft memorandum; and (4) even if Graul did testify that he saw the subject draft memorandum, the arbitrator clearly held that Field was not relieved from his burden to show that his conduct was proper and ordinary.

Discussion

On a motion to renew, the movant must provide the court with new information that was not previously available with due diligence. See *Disston Co. v. Aktiebolag*, 187 A.D.2d 283 (1st Dept. 1992); *Levitt v. County of Suffolk*, 166 A.D.2d 421 (2nd Dept. 1990). Under the Federal Arbitration Act, which applies to this proceeding, an arbitration award may be vacated “where the award was procured by corruption, fraud or undue means.” 9 U.S.C. Section 10(a)(1). Section 10(a)(1)'s fraud provision serves as grounds for vacating an arbitration award only if the offended party proves the fraud by clear and convincing evidence, shows the fraud was not discoverable by due diligence before or during the proceeding, and shows that the fraud was materially related to an arbitration issue. See *McCarthy v. Smith Barney, Inc.*, 58 F. Supp. 2d 288 (S.D.N.Y. 1999).

Here, Field has not proven that the arbitration award was procured by fraud. Field has not demonstrated, by clear and convincing evidence, that BDO fraudulently concealed evidence from the arbitrator. According to BDO, in June 2012, it provided the arbitrator with a copy of a summary judgment decision in the MLB action, which fully disclosed that depositions had been taken in the MLB action, and referenced the subject draft

memorandum. In any event, any failure by BDO to specifically provide the arbitrator with the Graul deposition testimony was not materially related to an arbitration issue. The subject testimony merely provides that at a risk management committee meeting in 2000 or 2001, a copy of a memorandum prepared by Skadden was passed around, which Graul only skimmed. He did not know if it was a final report or a draft report. He testified that "it did not say draft." He had no recollection of its contents. The evidence presented does not support an inference that the memorandum that he skimmed at the 2000 or 2001 meeting, was the subject draft memorandum.

Finally, the arbitrator held, "to be successful on his claim for indemnity, [Field] must allege and prove by a preponderance of the evidence that the work he did relating to the tax shelters was ordinary and proper." Even if Field had proven by clear and convincing evidence that BDO fraudulently withheld Graul's testimony from the arbitrator, and even if Graul clearly and unequivocally testified that he had seen the

subject 2001 draft memorandum, that alleged fraud is still not materially related to the issue at arbitration of whether Field's work was "ordinary and proper."

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Denis M. Field's motion to renew his petition to vacate the arbitration award dated July 17, 2012 is denied.

This constitutes the decision and order of this Court.

Dated: New York, New York
November 20, 2014

ENTER:


J.S.C.
HON. SALIANN SCARPULLA

FILED

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