SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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INDEX NO. 652796/2018

JACOB FRYDMAN, WINTER 866 UN LLC, UNITED REALTY PARTNERS, LLC, UNITED REALTY CAPITAL MARKETS, LLC, UNITED REALTY 866 UN PLAZA, LLC, UNITED 866 MANAGEMENT, LLC, JOHN DOES 1-5

MOTION DATE N/A

MOTION SEQ. NO. 001

Petitioner,

- v -

EVUNP HOLDINGS, ELI VERSCHLEISER,

Respondent.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT

In this special proceeding, petitioners Jacob Frydman (Frydman), Winter 866 UN LLC, United Realty Partners, LLC, United Realty Capital Markets, LLC, United Realty 866 UN Plaza, LLC, and United 866 Management, LLC (United 866) (collectively, Petitioners), move for an order, pursuant to CPLR 7510, confirming a final arbitration award, dated April 23, 2018 (the Final Award), rendered by a panel of arbitrators against respondents EVUNP Holdings (EVUNP) and Eli Vershleiser (Vershleiser) (together, Respondents), which awarded Petitioners reimbursement of attorneys' fees in the amount of $146,514.08, JAMS arbitration fees in the amount of $116,534.09, and expenses in the amount of $9,426.59, for a total award of $272,474.76. Respondents oppose confirmation of the Final Award but have not moved under Article 75 of the CPLR to modify or vacate the award.

BACKGROUND

The arbitration that resulted in the Final Award was commenced by Respondents who sought damages for the alleged wrongful activities of Frydman and Petitioners in connection with an attempted transaction involving the purchase of certain property named 866 UN Plaza, located at 48th Street and 1st Avenue, New York, New York (the Property). The Court presumes the parties' familiarity with the relevant facts of the transaction, which facts are stated in detail in the Final Award (*see* NYSCEF Doc. No. 12 [the Final Award]). Accordingly, only the details necessary to the instant petition are referenced herein.

On September 27, 2013, Fryman and Vershleiser formed United 866 by executing an Operating Agreement of United 866 Management, LLC, for the purpose of acquiring and developing the Property. Thereafter, United 866 and Meadow Partners entered into a joint venture agreement whereby United 866 would share in the proceeds of the purchase of the Property, but only if United 866 was able to raise a certain sum of money to contribute to the deal on or before November 29, 2013 (Final Award, p.4). Ultimately, United 866 failed to raise sufficient capital.

Fryman and Vershleiser business relationship deteriorated and, on December 3, 2013, Fryman and Vershleiser, on behalf of certain entities, executed a Membership Interests Sale and Purchase Agreement (PSA), whereby Vershleiser, *inter alia*, transferred all of his interests in a variety of companies identified in the PSA to Frydman and waived his right to share in any benefits, distributions, and compensation granted to any of those entities (Final Award, p. 6). After the PSA was signed, Vershleiser sought to amend the PSA to, inter alia, permit Vershleiser to share in any broker fee received by 866 United regarding the transaction to purchase the Property. However, the parties never agreed to an amendment of the PSA.

On December 16, 2013, after Vershleiser signed the PSA relinquishing his right to share in any compensation received by 866 United, Frydman executed a release agreement with Meadow under which Meadow agreed to pay $2 million to certain persons and entities, including Mr. Frydman, that were involved in the transaction to purchase the Property.

Ultimately, a dispute arose between Frydman and Vershleiser over whether Vershleiser was entitled to share in the $2 million received from Meadow under the release agreement and, on July 21, 2015, Respondents filed and serve upon Petitioners a Demand for Arbitration before JAMS, seeking that arbitration be had in New York City pursuant to the terms of the 866 Management Operating Agreement.[1] In the Statement of Claim, Respondents sought redress for the alleged wrongful activities of Petitioners in connection with the attempted transaction and damages for "breach of contract, breach of fiduciary duties, and other wrongful acts," by Frydman (NYSCEF Doc. No. 5, p. 2 [Demand for Arbitration]).

On February 12, 2018, the panel of arbitrators issued a partial award (the Partial Award), denying all of Respondents claims and finding that Vershleiser had waived his entitlement to share in any of the compensation received from Meadow. The Partial Award was based on substantial evidence from the parties and a lengthy hearing, the evidentiary portion of which consumed over 1,200 transcript pages. Both sides had a full and fair opportunity to be heard. In conjunction with the Partial Award, the panel entered a scheduling order, which set a schedule for post-hearing briefs on the issue of Frydman's entitlement to reimbursement for fees and the

[1] Section 9.1 of the 866 Management Operating Agreement, entitled "Exclusive Jurisdiction," provides:

> All disputes between or among any of the Managers and/or the Members or between any Member(s) and/or Manager(s) and the Company arising out of or relating in any way to this Agreement or Company business ("Disputes") shall be resolved exclusively pursuant to this Article 9 by arbitration in the State of New York.

(NYSCEF Doc. No. 4, pp. 26-27).

admissibility of parole evidence. Intrinsic in the panel's denial of Respondents' claims was a finding that the PSA was valid and enforceable.

On April 23, 2018, the panel issued the Final Award, which awarded Petitioners their reasonable fees, arbitration costs, and expenses under Paragraph 9.6 of the Operating Agreement of United 866 Management, LLC, which provides:

> Attorney's Fees. All fees, costs and expenses, including reasonable attorneys' fees, court costs and costs of appeal, included by the prevailing party in any such litigation, action arbitration or proceeding shall be reimbursed by the non-prevailing party; provided, that if a party to any such litigation, action or arbitration or proceeding prevails in part, and losses in part, the court, arbitrator or other adjudicator presiding over such litigation action, arbitration or proceeding shall award a reimbursement of the fees, costs and expenses incurred by such party on an equitable basis. This Section is intended to be severable from the other provisions of this Agreement and to survive and not be merged into any such judgment.

(NYSCEF Doc. No. 4, p. 27).

DISCUSSION

Now, Petitioners move to confirm the Final Award. 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 (*Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.*, 44 Misc 3d 1215(A) [Sup Ct NY County 2013], quoting *Wien & Malkin LLP v. Helmsley–Spear, Inc.*, 6 NY3d 471, 475 [2006]; see also *Matter of Uram v. Garfinkel*, 16 AD3d 347, 348 [1st Dept 2005]). In opposition to Petitioners' application for confirmation of the Final Award, Respondents argue (1) the petition is facially defective; (2) improper service of process warrants dismissal of the petition; and (3) the petition must be denied as the validity of the PSA is a threshold issue that must first be decided by this Court.

A. The Petition Is Not Facially Defective.

Respondents argue the petition is facially defective because (1) Petitioner failed to submit a properly sworn affidavit in support of the petition and (2) copy of the final arbitration award submitted by Petitioner is not properly notarized. Where a document on its face is properly subscribed and bears the acknowledgement of a notary public, it "give[s] rise to a resumption of due execution, which may be rebutted only upon a showing of clear and convincing evidence to the contrary" (*Spilky v Bernard H. La Lone, Jr. P.C.*, 227 AD2d 741, 743 [3d Dept 1996]). Contrary to Respondents' arguments, the verification to the verified petition (NYSCEF Doc. No. 1, p. 9) and the final arbitration award (NYSCEF Doc. No. 12, p. 15), were both signed in the presence of a notary public. Moreover, Respondents fail to proffer evidence that clearly refutes the presumption of due execution. Accordingly, the Court finds that Respondents' arguments are without merit.

B. Service Of Process Was Proper.

Respondents argue that service of process was defective because Vershleiser, EVUNP's managing member, was immune from service when he was personally served during his attendance as a party to a proceeding in the Southern District Court of New York, located at 500 Pearl Street, New York, New York, on June 7, 2018, at 11:25 AM. Under the courthouse sanctuary doctrine, a non-resident of the State of New York cannot be served process while compelled to attend court proceedings within New York State (*see, e.g.*, Sampson v Graves, 208 AD 522, 526 [1st Dept 1924] [finding service on a Philadelphia, Pennsylvania resident while attending court in New York was improper]). Here, Vershleiser is a New York resident and, thus, the courthouse sanctuary doctrine does not apply. Accordingly, in the absence of a sworn, nonconclusory denial of the specific facts to rebut proper service (*NYCTL 1998-1 Trust & Bank*

of NY v Rabinowitz, 7 AD3d 459 [1st Dept 2004]), the affidavit of personal service on Vershleiser, is sufficient to establish that this Court has personal jurisdiction over Vershleiser (NYSCEF Doc. No. 14 [Affidavit of Service]; *see also Matter of Nazarian v Monaco Imports, Ltd.*, 255 AD2d 265 [1st Dept 1998] [it is well settled law that affidavits of service attesting to service of process constitute prima facie evidence of proper service]).

C. The Validity Of The PSA Is Not Before This Court.

Last, Respondents argue that confirmation of the Final Award is improper as the validity of the Membership Interest Sale and Purchase Agreement (PSA), whereby Vershleiser, *inter alia*, transferred all of his interests in a variety of companies identified in the PSA to Frydman and waived his right to share in any benefits, distributions, and compensation granted to any of those entities (Final Award, p. 6).

It is well settled that a party seeking to vacate an arbitration award carries a "heavy burden" (*Scollar v. Cece*, 28 AD 3d 317 [1st Dept 2006], citing *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York,* 94 NY2d 321, 326 [1999]). An arbitration award must be upheld when the arbitrator "offers even a barely colorable justification for the outcome reached" (*Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert. dism.* 548 US 940, 127 S.Ct. 34 [2006][citations omitted]). As stated by the Court of Appeals, "we have stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice (id., citing *Matter of Sprinzen [Nomberg],* 46 NY2d 623, 629 [1979]); *see also Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York,* supra, ["A court cannot examine the

merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one"]).

"The scope of judicial review of an arbitration proceeding is extremely limited" (*Elul Diamonds Co. Ltd. v. Z Kor Diamonds, Inc.*, 50 AD3d 293 [1st Dept 2008]). When determining whether to vacate an arbitration award, courts are "obligated to give deference to the decision of the arbitrator" and are constrained by the grounds set forth in CPLR 7511(b)(1). (*id.*). The standard of review is whether the award is supported by the evidence or other basis in reason as appears in the record (*Rose v. Travelers Ins. Co.*, 96 AD2d 551 [2d Dept 1983]; *see also Lin v Wong*, 52 AD3d 402, 402 [1st Dept 2008] [affirming trial court's order confirming attorneys' fee arbitration award where respondents failed to show that the dispute was not finally decided or that the amount awarded was totally irrational]).

Here, Respondents have not met their burden to demonstrate that the Final Award was arbitrary and capricious, without sound basis in reason, or unsupported by the evidence presented to the panel. Moreover, the issue of the enforceability of the PSA was intrinsic to the panel's determination that Vershleiser had waived all rights to compensation to various entities, including 866 United, under the PSA. Accordingly, Respondents' contentions that the Final Award is improper and that validity of the PSA is an issue that must prevent this Court from confirming the Final Award are without merit.

Thus, it is hereby

ORDERED and ADJUDGED that Petitioners' petition to confirm the Final Arbitration Award is granted; and it is further

ORDERED and ADJUDGED that pursuant to CPLR 7511(e) the award is confirmed; and it is further

ORDERED and ADJUDGED that the Clerk shall enter Judgment in favor of Petitioners and against Respondents, jointly and severally, in the amount of $272,474.76, plus interest at the rate of 9% from April 23, 2018, through the date of entry of judgment by the clerk, together with costs and disbursements as taxed by the Clerk, upon submission by Petitioners of an appropriate bill of costs.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

10/16/2018
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE