Cenni v Cenni
2018 NY Slip Op 32748(U)
October 24, 2018
Supreme Court, New York County
Docket Number: 652201/2018
Judge: William Franc Perry
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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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REBECCA CENNI

Petitioner,

- v -

ADRIAN CENNI,

Respondent.

INDEX NO. 652201/2018
MOTION DATE 08/23/2018
MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21
were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT

Petitioner, Rebecca L. Cenni, by notice of Petition seeks to confirm an arbitration award dated March 21, 2018, pursuant to CPLR § 7510; Petitioner seeks pre-and post-judgment interest pursuant to CPLR §§ 5001, 5002 and 5003; and seeks a judgment to be entered thereon pursuant to CPLR § 7514. Respondent, Adrian Cenni, by notice of Cross-Petition seeks to vacate the Arbitration Award dated March 21, 2018, pursuant to CPLR § 7511.

BACKGROUND/CONTENTIONS

Petitioner and Respondent are former spouses who together own 100% of the ownership interests in a group of limited liability companies, specifically the Atrium group of companies consisting of Atrium Staffing LLC, Atrium Payroll Services LLC, Atrium Managed Services, LLC, Atrium Staffing of California LLC, Atrium Staffing of New Jersey, LLC, and Atrium Services Staffing Ltd. (collectively "Atrium Companies"). Petitioner is the 51% sole managing member and Chief Executive Officer of the Atrium Companies, and Respondent was and is the

49% non-managing member and shareholder of the Atrium Companies. (NYSCEF Doc. No. 1, ¶¶ 1, 2, 3).

The Operating Agreements require that any disputes between Petitioner and Respondent with respect to the parties' rights under the Operating Agreements be resolved by binding arbitration with the American Arbitration Association ("AAA"). (NYSCEF Doc. No. 15, ¶ 13.02). According to the allegations set forth in the Petition, "following [Respondent's] improper and unauthorized attempts to bind the Atrium Companies to a services agreement (the "Unauthorized Agreement") with his wholly-owned United States Virgin Islands company", on May 12, 2017, Petitioner commenced an arbitration proceeding against Respondent with the AAA asserting claims for a declaratory judgment and recovery of legal fees and costs. (NYSCEF Doc. No. 1, ¶6).

Thereafter, Petitioner filed a Supplemental Statement of Claim seeking a declaratory judgment and injunctive relief with respect to, *inter alia*, the validity of a Joint Written Consent of the Majority Member and Sole Director of the Atrium Companies, dated November 7, 2017, and Respondent's removal from his position as an officer of the Atrium Companies. (NYSCEF Doc. No. 1, ¶13). Following the disposition of motions for summary judgment, (NYSCEF Doc. Nos. 2, 3), on March 21, 2018, the arbitrator entered a final Award in favor of Petitioner granting declaratory and monetary relief; specifically, directing Respondent to pay to Petitioner, the sum of $196,500.00 within thirty days of the date of this Award, plus interest at the New York legal rate from the date of this Award until said sum is paid in full. (NYSCEF Doc. No. 4). Respondent failed to pay the amounts directed by the Award.

Petitioner contends that there are no grounds to modify or vacate the Award and thus, the Petition to confirm the Award should be granted. Respondent, through notice of Cross Petition,

contends that the Award should be vacated because the Operating Agreements provide that equitable claims "may" be brought outside of arbitration indicating the parties' intent to carve out such claims for adjudication in court. Respondent also claims that the arbitrator's ruling, upholding Petitioner's explicit authority under the Operating Agreements to remove Respondent as an officer, is irrational and imperfectly executed. For the reasons that follow, the Petition is granted and the Cross Petition is dismissed.

STANDARD OF REVIEW/ANALYSIS

It is well settled that a party seeking to vacate an arbitration award carries a "heavy burden". *Scollar v. Cece*, 28 AD 3d 317, 812 NYS2d 521, 522 (1st Dept. 2006), citing *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 NY2d 321, 326, 704 NYS2d 910, 726 NE2d 462 (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, 813 NYS2d 691, 846 NE2d 1201 (2006), cert. dismissed 548 US 940, 127 S.Ct. 34, (2006), (citations omitted).

"The scope of judicial review of an arbitration proceeding is extremely limited" *Elul Diamonds Co. Ltd. v. Z Kor Diamonds, Inc.*, 50 AD3d 293, 854 NYS 2d 391, 392 (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.* An arbitration award will be disturbed only if a party's rights have been prejudiced by: (i) corruption or fraud in the procurement of the award; (ii) partiality of a neutral arbitrator; (iii) an arbitrator exceeding his or her power; or (iv) a failure to follow New York statutory procedure governing arbitration (CPLR 7511[b]).

Here, the arbitration provision set forth in the Operating Agreements is broad, mandating arbitration with the AAA of "[a]ny claim, controversy or dispute arising between the parties with respect to this Agreement … to the maximum extent allowed by applicable law" (NYSCEF Doc. No. 1, ¶ 5). The last sentence of this provision indicates that, "[n]otwithstanding any other provision of this Section, any Dispute in which a party seeks equitable relief may be brought in any court having jurisdiction" (*id*). Respondent contends that this sentence evinces an intent of the parties to carve out claims seeking equitable relief from the universe of claims the parties had agreed to arbitrate as set forth in Section 13.02 of the Operating Agreement and, as such, the Award must be vacated as the arbitrator exceeded his authority and improperly granted the equitable relief sought by Petitioner. Respondent's argument is without merit.

The use of the word "may" in this Section unequivocally provides the parties with the non-mandatory, permissive choice to pursue equitable relief in court or arbitration; it is not, as Respondent incorrectly asserts, a "carve-out" and it does not deprive the AAA of jurisdiction to arbitrate any dispute as mandated in that broad-form arbitration clause. (*see e.g. Baldwin Tech. Co. v Printers' Serv., Inc.*, No. 15 Civ. 07152 [GBD], 2016 WL 22555, at * 3, n.4 [SD NY Jan. 27, 2016] ["where a contract has both a broad arbitration clause and a clause permitting the parties to seek injunctive relief before a court, courts in this District have construed the latter clauses as permitting the parties to seek 'injunctive relief … in aid of arbitration, rather than … transforming arbitrable claims into nonarbitrable ones depending on the form of relief prayed"].

Additionally, Petitioner contends that Respondent waived the issue of whether the claims were arbitrable because he did not raise this issue before the arbitrator, citing the terms of the Operating Agreements which mandate arbitration of "[a]ny claim, controversy or dispute arising between the parties with respect to this Agreement," and require that such arbitration be

"conducted pursuant to the terms of the Federal Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association". Petitioner avers that Respondent had the opportunity to raise this issue before the arbitrator and failed to do so. Accordingly Petitioner claims that Respondent is precluded from raising this issue in his Cross Petition seeking to vacate the Award.

It is well-established under New York law that, "[w]here parties agree that the AAA rules will govern, questions concerning the scope and validity of the arbitration agreement, including issues of arbitrability, are reserved for the arbitrators" (*Flintlock Constr. v Weiss*, 122 AD3d 51, 54 [1st Dept. 2014]; *see also Smith Barney v Sacharow*, 91 NY2d 39, 45-46 [1997] [holding that a provision empowering arbitrators to interpret and determine "the applicability of all provisions" constituted a "clear and unmistakable" agreement to arbitrate the issue of arbitrability]). "[W]hen the parties' agreement specifically incorporates by reference the AAA rules, which provide that the tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement, and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators'" (*Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD 3d 495 [1st Dept. 2009] [quoting *Smith Barney*, 91 NY2d 39]).

Based on the record before the court, Respondent had the opportunity to raise the issue of arbitrability before the arbitrator and did not do so. (NYSCEF Doc. Nos. 2, 3, 4). Accordingly, any dispute that the Operating Agreements required judicial resolution of equitable claims was for the arbitrator to determine and cannot be raised for the first time in the Cross Petition seeking to vacate the Award. (*see Peckerman v D & D Assocs.*, 165 AD2d 289, 295 [1st Dept 1991]

[arbitrability waived where issue not raised in application for stay or by registering objection with arbitrator]).

Respondent claims that the arbitrator exceeded his powers and incorrectly decided the issues against him, in complete contradiction to the terms and conditions of the Operating Agreements, rendering the Agreements null and void and without effect. To establish that an arbitrator has "exceeded his power" within the meaning of CPLR §7511(b) (iii), a party must show that the award "violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power under CPLR §7511 (b) (i)." *Elul Diamonds Co.*, supra at 392. The standard of review is whether the award is supported by the evidence or other basis in reason as appears in the record. *Lin v Wong*, 52 AD3d 402, 402 [1st Dept. 2008]

Respondent has not sustained his burden of proof as there is no evidence before the court that the award clearly exceeds the arbitrator's power, nor is there proof that the Award violates "a strong public policy" or is "irrational". 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, 415 NYS2d 974, 389 NE2d 456 (1979); *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 Award sought to be vacated is based on the arbitrator's review of the terms and provisions of the Operating Agreements and the evidence submitted in support of Petitioner's claims which demonstrate that Petitioner is "the majority owner and sole managing member of

the Atrium Companies". (NYSCEF Doc. No. 4). The record before the court does not demonstrate that the arbitrator exceeded his powers within the meaning of CPLR 7511(b)(1)(iii).

CONCLUSION

ORDERED AND ADJUDGED that the petition is granted and the award rendered in favor of Petitioner and against Respondent is confirmed; and it is further

ORDERED AND ADJUDGED that the cross petition filed by Respondent to vacate the award rendered in favor of Petitioner and against Respondent is denied and the cross petition is dismissed; and it is further

ORDERED AND ADJUDGED, that the clerk of court is directed to enter judgment in favor of Petitioner Rebecca L. Cenni, residing at 108 Reade Street, Apt. 5W, New York, New York, and against Respondent Adrian Cenni, residing at 21 South End Ave., New York, New York, for the principal sum of $204,318.75, with interest at the statutory rate from March 21, 2018 until the date of entry of judgment in the amount of $_____, together with costs and disbursements in the amount of $_____, for a total judgment of $_____; and it is hereby further

ADJUDGED, that Petitioner shall recover and have execution therefor.

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.

10/24/2018
DATE

W. FRANC PERRY, J.S.C.

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

652201/2018 CENNI, REBECCA L vs. CENNI, ADRIAN
Motion No. 001