CM Growth Capital Partners v Penn
2018 NY Slip Op 33430(U)
January 2, 2018
Supreme Court, New York County
Docket Number: 653264/2016
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. O. PETER SHERWOOD** **PART** **IAS MOTION 49EFM**

Justice

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CM GROWTH CAPITAL PARTNERS,

Plaintiff,

- v -

PENN, III, LAWRENCE, et al.

Defendants.

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INDEX NO. 653264/2016

MOTION DATE 08/20/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 80, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 121, 132

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

According to the complaint in this action, plaintiff CM Growth Capital Partners, L.P. (CM Growth) did business as Camelot Acquisitions: Secondary Opportunities, L.P., a private equity fund which invested money contributed by the limited partners. Defendant Camelot Acquisitions Secondary Opportunities Management LLC (CASOM) was plaintiff's investment advisor, which was controlled by defendant Lawrence Penn, III. Penn also controlled the plaintiff's one-time general partner, defendant Camelot Acquisitions Secondary Opportunities G.P. (General Partner). Between 2010 and 2013, Penn and CASOM caused the plaintiff to purchase $9.3 million worth of fictitious services from Ssecurion, LLC (Ssecurion), a shell company controlled by Penn and his college acquaintance, Altura Ewers. Ssecurion provided no services, but transferred the funds to entities controlled by Penn. Penn and Ewers have both been convicted of felonies related to Ssecurion. Plaintiff then brought this action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, conspiracy to breach fiduciary duty, fraud, aiding and abetting fraud, conspiracy to commit fraud, fraudulent transfer, constructive fraudulent transfer, breach of contract, unjust enrichment, and conversion.

During the pendency of this litigation, the parties stipulated to take this dispute to arbitration. Now, defendant Penn, acting *pro se,* moves to vacate the award issued by the arbitrator pursuant to CPLR 7511 and section 10(a)(4) of the Federal Arbitration Act (9 USC §10), on the grounds that the arbitrator exceeded her power and acted with manifest disregard for the law. Plaintiff moves separately to confirm the award (Mot. Seq. No. 006).

"It is a bedrock principle of arbitration law that the scope of judicial review of an arbitration proceeding is extremely limited. Indeed, [c]ourts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined" (*Frankel v Sardis*, 76 AD3d 136, 139 [1st Dept 2010] [internal citations omitted]. "Therefore, the showing required to avoid summary confirmation of an arbitration award is high, and a party moving to vacate the award has the burden of proof" (*U.S. Elecs., Inc. v Sirius Satellite Radio, Inc.*, 73 AD3d 497, 498 [1st Dept 2010]).

"An arbitral award may be vacated for manifest disregard of the law only if a reviewing court finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case" (*Wallace v Buttar*, 378 F3d 182, 189 [2d Cir 2004] [internal quotations omitted]). The "cases demonstrate that [courts] have used the manifest disregard of law doctrine to vacate arbitral awards only in the most egregious instances of misapplication of legal principles" (*id.* at 190) and "the Second Circuit does not recognize manifest disregard of the evidence as proper ground for vacating an arbitrator's award. . . [,] only the doctrine of manifest disregard of the law, which doctrine holds that an arbitral panel's legal conclusions will be confirmed in all but those instances where there is no colorable justification for a conclusion. To the extent that a . . . court may look upon the evidentiary record of an arbitration proceeding at all, it may do so *only* for the purpose of discerning whether a colorable basis exists (*id.* at 193).

Penn argues that plaintiff withdrew the primary action seeking $9.3 million, which was also barred by *res judicata* (Memo, NYSCEF Doc. No. 86, at 4). In fact, plaintiff clarified at that hearing that it was not seeking the $9.3 million which had been taken from the fund, but was suing for the "$7 million in management fees that Mr. Penn was paid during the course of his role as general partner and investment manager to the fund" (AAA Hearing Minutes of April 10, 2018, attached as Exhibit E to Penn's Memorandum of Law, NYSCEF Doc. No. 91, at 14).

Penn also contends Delaware law applied to the dispute, meaning the arbitrator erred in applying New York's Faithless Servant doctrine and granting this $7,365,098 award, plus interest and fees and expenses, and the decision should be vacated and the matter remanded to a new arbitrator. Plaintiff disputes that it was agreed, either by the parties or the arbitrator, that Delaware law applied to the dispute, as the Delaware choice of law provision in the agreement did not apply to tort claims and it was left to the arbitrator to decide what state's law to apply to tort claims (Opp at 12-14). However, even if Delaware law applied, Delaware courts have broad discretion to fashion an appropriate remedy and "[w]here there is a breach of the duty of loyalty, as here . . . the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly [because t]he strict imposition of penalties under Delaware law [is] designed to discourage disloyalty. Therefore, the Court of Chancery's powers are complete to fashion any form of equitable and monetary relief as may be appropriate" (*Gotham Partners, L.P. v Hallwood Realty Partners, L.P.*, 817 A2d 160, 176 [Del 2002][internal quotations omitted]). Further, while "Delaware law does not recognize a faithless fiduciary doctrine ... at least one Delaware court has held that corporate officers may be required to forfeit their compensation if their breach of fiduciary duty was of some detriment to the corporation" (*Mayers v Stone Castle Partners, LLC*, 2015 N.Y. Slip Op. 30711[U] [Sup Ct, New York County 2015] quoting *Hollinger Int'l, Inc. v Hollinger Inc.*, 2005 WL 589000, at *29 n.25 [ND Ill 2005], quoting *Citron v Merritt-Chapman & Scott Corp.*, 409 A2d 607, 611 [Del Ch 1977]).

As far as Penn argues the award is punitive, as he is already obligated to return the stolen funds, and therefore prohibited, some Delaware courts have considered compensation paid to a faithless fiduciary a benefit to the fiduciary which should be disgorged (*see Thorpe by Castleman v CERBCO, Inc.*, 676 A2d 436, 437 [Del 1996]; *Craig v Graphic Arts Studio, Inc.*, 39 Del Ch 447, 452 [Del Ch 1960] ["plaintiff should not be permitted to maintain an action in this court to recover compensation from his employer for the period when he was violating his fiduciary duty"]).

The actual rationale applied by the arbitrator is unclear, as the Decision merely states the conclusion and does not provide any reasoning, pursuant to the agreement of the parties, who elected a "Standard Award" (*see* Report of Preliminary Hearing and Scheduling Order, attached as Exhibit F to Healy aff, NYSCEF Doc. No. 109). Accordingly, it is not defective for that

reason. Further, as discussed above, there is at least a colorable justification for the arbitrator's conclusion.

The Court has considered Penn's remaining arguments and finds them to be without merit. Accordingly, the motion to vacate the arbitrator's decision is hereby DENIED.

1/2/2018
DATE

O. PETER SHERWOOD, J.S.C.

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