Hart v Downing
2019 NY Slip Op 30302(U)
February 7, 2019
Supreme Court, New York County
Docket Number: 657175/17
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC PART 47

Hart

-v-

Downing

INDEX No. 657175/17

MOTION DATE

MOTION SEQ. No. 005

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause – Affidavits – Exhibits ____ No(s). 1

Answering Affidavits – Exhibits ____ No(s). 2

Replying Affidavits ____ No(s). 3

Respondent Michael H. Shaut moves pursuant to 9 U.S.C. § 10 and CPLR 7511 to vacate the arbitration award issued on November 21, 2017, and to dismiss the petition to confirm the award. As discussed in this court's order dated February 20, 2018, and as respondent Shaut concedes in his moving papers, this dispute is governed by the Federal Arbitration Act ("FAA", 9 U.S.C. § 1 et seq.). *See Citizens Bank v. Alafabco, Inc.*, 539 U.S.52, 55-56 (2003). Under the FAA, a notice of motion to vacate an arbitration award must be served within three months after the award is filed or delivered. 9 U.S.C. § 12. The statute affords "no exception" to this service period and thus "a party may not raise a motion to vacate, modify, or correct an arbitration award after the three month period has run, even when raised as a defense to a motion to confirm." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984). Therefore, the motion to vacate is untimely.

Even if respondent Shaut's motion had been timely filed, it would fail on the merits. First, respondent Shaut argues that the award must be overturned because he was not properly served with the demand for arbitration and because petitioners failed to provide the tribunal with proper contact information, thereby denying him his due process rights and rendering the hearing fundamentally unfair. "Due process in arbitration means satisfying minimal requirements of fairness [and] [t]hat standard is met when the parties have had adequate notice and opportunity to be heard by unbiased decision makers." *McMahan & Co. v. Dunn Newfund I, Ltd.*, 230 A.D.2d 1, 4 (1st Dep't 1997) (internal citations and quotations omitted). Here, the petitioners served respondent Shaut with the demand for arbitration by certified mail, return receipt requested, which was return signed, to Downing Investment Partners, LP, which at the time was listed as Shaut's place of business. As the arbitrator found, the petitioners properly relied on this address in order to effect service on Shaut pursuant to the AAA rules. Affidavit of Michael H. Shaut sworn to on September 14, 2018, Exh. Q. To the extent that petitioners allegedly failed to provide Shaut's contact information to the tribunal, as required by the AAA rules, respondent Shaut fails to show that this prejudiced him in the course of the proceeding as all of the deadlines were extended following Shaut's participation in the arbitration, thereby affording Shaut with adequate notice and an opportunity to be heard by the tribunal. *McMahan & Co.*, 230 A.D.2d at 4.

CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

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Respondent Shaut argues that as a result of petitioners' failure to provide his contact information, he did not have a chance to participate in the selection of the arbitrator, Carol A. Mager, who Shaut argues was evidently partial and biased in favor of petitioners. "Evident partiality may be found only where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. The party seeking vacatur must prove evident partiality by clear and convincing evidence." *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016) (internal citations and quotations omitted). Here, respondent Shaut argues that Ms. Mager was evidently partial given her unilateral selection by the petitioners and her background as an experienced employee-side litigator. However, Ms. Mager's background as an advocate for employees is insufficient to demonstrate "evident partiality," particularly given that "arbitrators are usually knowledgeable individuals in a given field [and] often they have interests and relationships that overlap with the matter they are considering as arbitrators." *Florasynth, Inc.*, 750 F.2d at 173. Respondent Shaut also argues that Ms. Mager was evidently partial because she did not cite to Shaut's submissions in her decision and did not explain why she found Shaut's submissions untrustworthy. However, the court will not second-guess Ms. Mager's factual findings regarding Shaut's submissions, which Ms. Mager was not required to justify in any event. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (holding that arbitrators are not required to provide an explanation for their decision). Finally, Ms. Mager's refusal to consider Mr. Wagner's deposition testimony, which Shaut submitted after the record was closed, was within the arbitrator's broad discretion to enforce procedural deadlines and in any event, did not deprive Shaut of an adequate opportunity to be heard given his prior submissions and motions which were considered by the arbitrator. *Landmark Ventures, Inc. v. Insightec, Ltd.*, 63 F.Supp.3d 343, 352 (S.D.N.Y. 2014).

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Respondent Shaut also argues that the arbitrator exceeded her powers and did not have jurisdiction over him because he was not a signatory to the arbitration agreements. Respondent Shaut seeks *de novo* review of the arbitrator's finding on the issue of arbitrability. However, as stated in this court's order dated August 30, 2018, by specifically incorporating the AAA rules into the arbitration clause, the parties expressly agreed to submit the issue of arbitrability to the arbitrator. *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495 (1st Dep't 2009). Respondent Shaut's argument that the arbitration clause is ambiguous because it also states that the arbitration may be governed by such other "rules as may be unanimously agreed to" is unpersuasive as it is undisputed that no other rules were agreed to by the parties. Shaut Aff., Exhs. C, D, E, and F.

Respondent Shaut also argues that the terms of the arbitration agreement cannot be considered when deciding whether a non-signatory agreed to submit the issue of arbitrability to an arbitrator. Even if this is correct, Shaut's argument does not change the court's conclusion on this issue. As Shaut himself admits, an arbitration clause may be binding on a non-signatory under a veil piercing/alter ego-theory. *See* Mem. of Law in Support of Respondent Shaut's Motion, p. 19 (citing *Kramer Levin Naftalis & Frankel LLP v. Cornell*, 2016 N.Y. Slip. Op. 32863(U), at *11 (Sup. Ct. N.Y. Cty. July 14, 2016). Here, the arbitrator made an affirmative finding of corporate veil piercing liability with respect to all respondents, including respondent Shaut. Shaut Aff., Exh. U, pp. 5 ("Respondents Wagner, Shaut, Lawrence and Buckingham dominated and controlled all Respondent corporate entities . . . and each of the four controlling individuals is jointly and severally liable for the actions of the others and the corporate entities); 13-14 (finding that Shaut was actively involved in the corporate entities "at the highest level" and knew or should have known that "inducements he was making were not accurate"); 16 (addressing issue of arbitrability with respect to Shaut). Although Shaut disputes the arbitrator's factual findings on this issue, "the Second Circuit does not recognize manifest disregard of the evidence as proper ground for vacating an arbitrator's award" and therefore the court cannot disturb the arbitrator's factual findings. *See Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004). Given the arbitrator's factual finding of alter ego liability with respect to Shaut, he is bound by the arbitration clause in the agreements. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777-78 (2d Cir. 1995). Thus, the motion to vacate must be denied.

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Respondent Shaut also moves pursuant to CPLR 3211 to dismiss the petition based on lack of personal jurisdiction. This is Shaut's second motion to dismiss and thus it must be denied as procedurally improper. CPLR 3211(e). In any event, Shaut's arguments in support of the motion are meritless. First, Shaut argues that the arbitration was not conducted in New York and that he does not otherwise have sufficient contact with New York to subject him to personal jurisdiction here. However, as discussed in the court's prior order denying Shaut's first motion to dismiss, a finding of alter ego liability may confer personal jurisdiction over respondent Shaut. *So. New Eng. Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 138 (2d Cir. 2010); *see also Deutsche Bank, AG v. Vik*, 142 A.D.3d 829 (1st Dep't 2016). Here, the arbitrator found that the respondent corporate entities, located in New York, were alter egos of respondent Shaut. Shaut Aff., Exh. U, p. 5. The arbitrator's finding is a binding predicate based on the doctrines of res judicata and collateral estoppel. *Waverly Mews Corp. v. Waverly Stores Associates*, 294 A.D.2d 130, 132 (1st Dep't 2002). Thus, Shaut had sufficient contacts with New York, under an alter ego theory, to subject him to personal jurisdiction in this State. With respect to the issue of improper service, respondent Shaut failed to raise this issue until he filed his reply papers on the prior motion to dismiss and thus it is deemed waived. CPLR 3211(e).

Since respondent Shaut has failed to demonstrate grounds to vacate or modify the arbitration award, it must be confirmed. 9 U.S.C. § 9; *see also* CPLR 7510.

Accordingly, it is

ORDERED that the petition to confirm the arbitration award with respect to respondent Michael H. Shaut is GRANTED; and it is further

ORDERED that the Clerk is directed to amend the court's judgment filed on April 12, 2018, solely to the extent of reinstating the judgment with respect to respondent Michael H. Shaut.

Dated: 2/7/19

Hon. Paul A. Goetz, JSC

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