Xiangyang Luo v Tessler
2022 NY Slip Op 31684(U)
May 23, 2022
Supreme Court, New York County
Docket Number: Index No. 654707/2020
Judge: Arlene Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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XIANGYANG LUO, CHUNXI ZHANG, GE WU, QIAOMEI LI, GANG ZHAO, JINFEI PAN, TIANZHI CUI, JUN TIAN, YANSHU NIU, XIAOWEI MEI, GUORONG GONG

Plaintiffs,

- v -

YITZCHAK TESSLER, BIG APPLE CAPITAL MANAGEMENT, LLC,NEW YORK PROTON REGIONAL CENTER, LLC,NCM USA BRONX LLC,f/k/a NCM USA, LLC, NCM USA MANAGEMENT, LLC,NCM USA SERVICE BRONX, LLC,JOHN DOES 1-5 , TESSLER DEVELOPMENT, LLC,

Defendants.

BIG APPLE CAPITAL LENDERS LLC,
Nominal Defendant.

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INDEX NO. 654707/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for CONFIRM AWARD.

The motion by plaintiffs to confirm the arbitration award is granted. The cross-motion by defendants to vacate the subject arbitration award is denied.

Background

Plaintiffs contend that they are twelve members of Big Apple Capital Lenders, LLC ("Big Apple") and that defendant Tessler caused Big Apple to violate the terms of a loan agreement. Plaintiffs seek repayment of two loans made to defendants, loans that were allegedly made pursuant to the EB-5 program offered by U.S. Customs and Immigration Service. Under this program, projects can secure investment from foreign investors. Plaintiffs contend that the

borrowers, all entities controlled by defendant Tessler, received $6 million and none of the principal or interest has been repaid. According to plaintiffs, the borrowers sought funds to set up proton therapy centers.

In prior motion practice, this Court found that the instant dispute should be decided via arbitration pursuant to the terms of the parties' agreement (NYSCEF Doc. No. 50). Following that arbitration, plaintiffs move to confirm the arbitrator's award, which awarded plaintiffs over $7 million in relation to two loans from certain defendants and found that Tessler Developments, LLC (as the guarantor) is liable "in the amount of $8 million to the extent the loan is not paid by [defendants]" (NYSCEF Doc. No. 62 at 33). The arbitrator concluded that books and records of Big Apple Capital Management LLC and Big Apple Capital Lender LLC had to be immediately turned over and that each party was to cover their own legal fees (and equally split the expenses of the arbitration) (*id*. at 34). The arbitrator also found that the contractual interest rate of 4.5% applied rather than the 1.5% rate as argued by defendants (*id*. at 29).

Plaintiffs contend that the award was the result of oral argument before the arbitrator, briefing, an initial 38-page partial award, followed by a final award. They insist that the loan agreement required the loans to be repaid within 5 years, with an additional one-year period allotted for refinancing efforts. Plaintiffs insist they did not receive any payments from defendants.

Plaintiffs argue that during the arbitration, defendants sought to delay the process despite the fact that the loan agreement contained a requirement that the arbitration hearing shall start within 90 days of the demand for arbitration and conclude within 120 days. They point out that the initial award concluded that the first loan of $4 million matured on June 30, 2019 and the second loan of $2 million matured on June 30, 2021. It also found that the Manager (defendant

Big Apple Capital Management LLC) was subject to removal for the failure to act on behalf of the lender's members, including the failure to prosecute the loan default.

The later-issued final award incorporated the initial award and focused on the guaranty by Tessler Developments LLC. Plaintiffs observe that defendants agreed to add this entity as a party to the arbitration. They insist the award was rational and the result of a careful analysis of the loan documents and the facts presented.

Defendants cross-move to vacate the award. They insist that the arbitrator exhibited manifest disregard for the law and the arbitrator exceed his powers. Defendants complain that the only thing that transpired before the arbitrator was a pre-evidentiary hearing followed by summary judgment motion practice. They insist that there should have been a full evidentiary hearing to explore disputed factual issues, including whether the interest rate on the loans should be 1.5% or 4.5%. Defendants argue that plaintiffs made a prior statement (which they characterize as a judicial admission) that the interest rate was 1.5% and the arbitrator irrationally ignored that fact.

Defendants question how the arbitrator could reach the conclusions he did without having witnesses and evidence presented. They claim an affidavit by defendant Tessler and certain emails raised factual disputes that could not be decided based on papers alone.

In reply, plaintiffs insist that a hearing was not required and the arbitrator was entitled to make a decision on the papers. They point out that due to a purported illness suffered by defendant Tessler, the parties reached an agreement whereby plaintiffs were to seek dispositive relief, there would be oral argument of that motion on October 12, 2021 and the hearing on the remaining claims would be adjourned "sine die" (NYSCEF Doc. No. 67, ¶ 42). Plaintiffs

question how defendants can now complain about the process when they agreed to it in a joint stipulation.

With respect to the judicial admission argument (that plaintiffs allegedly admitted that the applicable interest rate should be 1.5%), plaintiffs contend that the arbitrator correctly rejected that argument in the final award on the ground that there had not been a finding about the interest rate in a prior judicial proceeding.

Discussion

"CPLR 7511 provides just four grounds for vacating an arbitration award, including that the arbitrator exceeded his power (CPLR 7511[b][1][iii]), which "occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. Mere errors of fact or law are insufficient to vacate an arbitral award. Courts are obligated to give deference to the decision of the arbitrator, even if the arbitrator misapplied the substantive law in the area of the contract (*NRT New York LLC v Spell*, 166 AD3d 438, 438-39, 88 NYS3d 34 [1st Dept 2018] [internal quotations and citations omitted]).

Here, the Court grants the motion to confirm the award and denies the cross-motion to vacate the award. The Court is unable to find that the arbitrator's award was irrational or against public policy. That there was no formal hearing, complete with witnesses, is not a bar to confirming the award (*Brooks v BDO Seidman, LLP*, 94 AD3d 528, 528-29, 942 NYS2d 333 [1st Dept 2012]). "Although the panel made a determination of the proceeding on respondent's motion for summary judgment, this was not improper since arbitrators are not compelled to conduct hearings, and may decide a case on summary judgment" (*id.*).

The Court recognizes that, ordinarily, it is preferable to conduct a hearing and hear from witnesses in an arbitration. But the failure to do so here is not a violation of defendants' due process rights. After all, this is a case about interpreting contracts for loans, loans that defendants do not deny taking out nor do they claim they paid them back. Rather the dispute appears to be about the maturity dates and the applicable interest rates. The Court is unable to find it was wholly irrational for the arbitrator to make findings, in the context of a dispositive motion, about the provisions of a contract. Such conclusions are often made by arbitrators and courts without the need for witness testimony (*see e.g.*, CPLR 3213 [motion for summary judgment in lieu of complaint]).

It is not the role of this Court to second guess an arbitrator's decision or find areas where it might disagree. The Court can only vacate an award under limited circumstances, as described above, and that situation is not present here. Rather, the arbitrator made two awards (the partial awards and final award) that are entirely rational. Defendants' dissatisfaction with the award is not a basis for this Court to nullify it.

Accordingly, it is hereby

ORDERED that the motion by plaintiffs to confirm the arbitration award is granted, the cross-motion to vacate the award is denied; plaintiffs are entitled to a judgment in favor of plaintiffs and against defendants New York Proton Regional Center, LLC, NCM USA Bronx LLC, NCM USA Management, LLC, NCM USA Services Bronx LLC on the first loan in the amount of $4,687,082.16 which was to be repaid by June 30, 2019 and against these same defendants on the second loan in the amount of $2,470,095.89 which was to be repaid by June 30, 2021, both with post-default interest at the statutory rate on these amounts from the respective dates of default; and to award judgment against Tessler Developments, LLC (as the

Guarantor), jointly and severally, on the first and second loans up to $8 million in principal with post-default interest on this amount to run from November 30, 2021; and it is further

DECLARED that Big Apple Capital Management LLC was validly removed as manager of Big Apple Capital Lenders LLC on January 28, 2022; and it is further

ORDERED that Big Apple Capital Management LLC shall turn over all books and records of Big Apple Capital Management LLC and Big Apple Capital Lender LLC on or before June 3, 2022; and it is further

ORDERED that plaintiffs are entitled to recover costs and fees for the arbitration in the amount of $8,087.50; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly upon presentation of proper papers therefor.

5/23/2022
DATE

ARLENE BLUTH, J.S.C.

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