SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

D.P.I. Imports, Inc.

INDEX NO. 651116/2023

MOT. DATE

- v -

MOT. SEQ. NO. 001

Q4 Designs, LLC

Q4 Designs, LLC

INDEX NO. 651258/2023

MOT. DATE

- v –

MOT. SEQ. NO. 001

D.P.I. Imports, Inc.

The following papers were read on this motion to/for confirmation

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

These petitions are brought pursuant to CPLR Article 75. In the first action, index no. 651116/2023, petitioner D.P.I. Imports, Inc. ("DPI") seeks an order pursuant to CPLR § 7510 confirming the arbitration award entered in its favor and against respondent Q4 Designs, LLC ("Q4") and directing a judgment be entered thereon pursuant to CPLR § 7514. In the second action, index no. 651258/2023, Q4 is the petitioner and seeks an order vacating the award entered in DPI's favor. As these two petitions concern the same arbitration award, the petitions are hereby consolidated for the court's consideration and disposition in this single decision/order. The petitions are decided as follows.

The award, dated December 12, 2022, resolved a dispute concerning a licensing agreement made on October 17, 2011 in which DPI granted Q4 an exclusive license to commercially use certain DPI trademarks in connection with the design, manufacture, marketing, distribution and sale of children's apparel in the United States, Canada and Mexico. The agreement had an initial term running from October 17, 2011 to December 31, 2014. Under the agreement, Q4 had the option to renew for two additional consecutive terms, the first running from January 1, 2015 to December 31, 2017 (the "first renewal term") and the second running from January 1, 2018 to December 31, 2020 (the "second renewal term").

On or about January 10, 2019, Q4 served DPI with an arbitration demand in which it claimed damages against DPI because DPI allegedly granted rights to one or more third parties in derogation of

Dated: 8/29/23

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate: ☒ SETTLE ~~ORDER~~ Judgment ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

rights that Q4 claimed were meant to be exclusively Q4's. DPI answered with two form answers, the first of which accused Q4 of failing to pay royalties and the second of which also stated that Q4 kept DPI from finding alternate Licensees.

The arbitration panel held a preliminary hearing on August 3, 2020 in which the parties agreed to be bound by the arbitration panel's decision, and to be governed by New York law. The arbitration panel then held multiple days of hearings at which each of the parties presented their case. After considering the evidence and witnesses presented by the parties, the arbitration panel issued a final award dated December 12, 2022. In that final award, the arbitration panel declared and awarded the following: 1. That Q4 failed to properly exercise its option for the second renewal term; 2. That DPI owes Q4 $188,301.80 for violation of Q4's exclusive licensing rights; 3. That Q4 owes DPI $656,679.00 for sales for which no payment was made; 4. That the administrative fees and arbitrator compensation for the arbitration be split evenly between the parties and that Q4 owes DPI $144,562.75 for money that DPI advanced; 5. That considering the 3 money sums awarded *supra*, Q4 owes DPI a net total of $323,814.45 and that the sum shall be paid within 45 days of the date of the final award with interest; 6. That each side shall bear its own attorney's fees; and 7. That all other claims and counterclaims are denied.

Now, the petitioner in the first action, DPI, seeks to confirm the arbitration award. It argues that the award should be confirmed because it has not been vacated or modified upon any grounds specified in CPLR § 7511, the petition was filed within one year of the date of the award, and Q4 has failed and refused to comply with the award and has not paid any of the amounts awarded.

Petitioner in the second action, Q4, seeks to vacate the award. It argues that the award should be vacated pursuant to CPLR § 7511(b)(1)(i) and (iii) as irrational and for misconduct because the final award was predicated on "an irrational rewriting by the Arbitration Panel of the License Agreement" and because the arbitration panel engaged in misconduct when it did not enforce its Order No. 14. Q4 argues that the arbitration panel rewrote the License Agreement because it imposed a non-existent condition precedent to renewal. It also argues that the arbitration panel engaged in misconduct when it failed to order an accounting of DPI's sales records. Q4 asserts that this outcome directly contravenes Order no. 14 and renders the arbitration panel's decision a product of misconduct.

DPI responds that the arbitration panel did not rewrite the license agreement. DPI claims that the arbitration panel's determination that the second renewal never occurred is rational because Q4 failed to send a proper notice of renewal and failed to reach a threshold of sales as required for renewal. DPI argues that even if the arbitration panel did misinterpret the license agreement, mistakes of law or fact are not a basis for vacatur of an arbitration award. DPI also asserts that the arbitration panel did not commit misconduct by not ordering an accounting because the accounting considered in Order No. 14 was conditional on the arbitration panel's satisfaction with DPI's production of relevant sales records. Additionally, DPI asserts that Q4 had a full and fair opportunity to argue its right to an accounting, and that the arbitration panel decided, after giving Q4 an opportunity to present its arguments, that a post-hearing accounting would be inappropriate.

DISCUSSION

Pursuant to CPLR § 7511(b)(1)(iii), an arbitration award shall be vacated on the application of a party who participated in the arbitration if the court finds that the rights of that party were prejudiced by an arbitrator making the award who exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. CPLR § 7511 (b)(1)(i) also allows vacatur of an arbitration award when the rights of the party were prejudiced by corruption, fraud, or misconduct in procuring the award.

An arbitrator exceeds her power when she goes beyond interpreting the contract between the parties and adds to its terms; effectively creating a new clause within the contract (see *National Cash Register Co. v. Wilson*, 8 NY2d 377 [1960]; *N.Y. City Transit Auth. v. Patrolmen's Benevolent Ass'n*, 129 AD2d 708 [2d Dept 1987]; *Hunsinger v. Minns*, 197 AD3d 871 [4th Dept 1993]). However, the mere fact that a different construction could have been accorded, and that a different conclusion could have been reached does not mean that the arbitrator so misread the contract as to empower the court to set aside the award; the interpretation must clearly be irrational and contrary to the terms of the contract (*National Cash Register Co. v. Wilson*, 8 NY2d 377 [1960]).

For voluntary arbitrations, judicial review of the award is extremely limited (*Wien & Malkin LLP v. Helmsley-Spear*, Inc. 6 NY3d 471 [2006]). Such an award will only be set aside if it is completely irrational, violative of a strong public policy, or exceeds a limitation on the arbitrator's power (*Obot v. New York State Dep't of Correctional Servs.*, 637 NYS2d 544 [4th Dept 1996] *aff'd* 653 NYS2d 883 [1996]). Courts give the widest berth possible to arbitral awards, and will sustain any construction of the facts and the agreement which is not irrational, provided that public policy is not offended (*Albany County Sheriff's Local 775 of Council 82, etc. on bahlf of Hughes v. County of Albany*, 479NYS2n 513 [1984]; *Five Boro Roofing & Sheet Metal Works, Inc. v. Van-Tulco, Inc.*, 580 NYS2d 263 [1st Dept 1992]). The deference given to arbitral awards is such that even a misapplication of the law will not be a sufficient basis for vacatur under CPLR § 7511 (*Matter of Douglas v. New York City Dept. of Educ.*, 34 NYS3d 340 [Sup Ct New York County 2016]; *Matter of Associated Teachers of Huntington v. Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 NY2d 119 [1973]).

First, Q4 argues that the arbitration award should be vacated because the arbitration panel exceeded its power and acted irrationally when it predicated the final award on "an irrational rewriting by the Arbitration Panel of the License Agreement." Q4 claims that the panel rewrote the contract when it required that Q4 put its agreement to the guaranteed minimum sales and guaranteed minimum royalties (together the "minimums") for the second renewal term in writing as part of its renewal notice. Q4 argues that the License Agreement did not require an agreement to the minimums. Rather it only required that Q4 put in writing that it *desired* to renew the agreement, which Q4 argues it did.

DPI responds that Q4 failed to send a proper notice of renewal and failed to reach a threshold of sales as required for renewal. DPI asserts that even if the arbitration panel did misinterpret the license agreement, mistakes of law or fact are not a basis for vacatur of an arbitration award.

For the reasons below, the court agrees with DPI.

A copy of the License Agreement has been submitted to the court. It states:

> with respect to the "Second Renewal Term" covering the period January 1, 2018 and continuing through December 31, 2020, (i) Licensee notifies in writing Licensor, certified mail return receipt requested, of its desire to renew this Agreement no later than June 30, 2017 time being of the essence (the "Renewal Notice"); (ii) Licensee has been at all times throughout the First Renewal Term in compliance with all terms of this Agreement including all payment requirements, or, if not, Licensee shall have cured timely any curable breach for which It has received written notice thereof from Licensor' and (iii) as of August 31, 2017, Licensee has combined shipped and confirmed purchase order commitments exceeding the amount of eighteen million dollars ($18,000,000) (the "Renewal Threshold Amount for the Second Renewal Term") for the Annual Period ending December 31, 2017

The License Agreement also states that the guaranteed net sales for the first renewal term would be $37,500,000, and that the guaranteed net sales for the second renewal term would be $45,000,000.

In the arbitration award, the arbitration panel considered emails in evidence and the testimony of Mr. Tawil, the head of Q4. The emails and the testimony demonstrate that between June 7 and June 13, Mr. Tawil submitted a renewal letter to Mr. Peyser, the head of David Peyser Sportswear, of which DPI is a part, through email and by hand delivering it to him. This letter expressed Q4's desire to renew the contract, but also sought to introduce new reductions in the minimums. The letter was the first time that Q4 had demonstrated any interest in renewing the agreement. Peyser responded that DPI would not agree to reduced minimums. On June 13, 2017, Tawil sent an email to Peyser stating that he would keep the minimums at the "current level [as the first term]." Peyser responded by asking "do you have a minute to discuss?" Peyser testified that his intention with this email was to begin a negotiation in response to Tawil's attempt to renew at the old minimum level (as this was not the level that the original License Agreement contemplated for the second renewal term). Negotiations continued for years with the parties unable to agree upon new terms for the renewal. In September 2017, Q4 submitted a markup of DPI's draft agreement in which it accepted the minimums as they were stated in the original License Agreement, but negotiations continued as to other clauses of the agreement. The parties never reached an agreement and in January 2020, Q4 filed its arbitration demand.

Based upon this evidence, the arbitration panel determined that Q4 failed to successfully renew the agreement for a second term. It stated that the renewal letter that Q4 submitted to Peyser was not a renewal notice, but rather was an invitation to negotiate new license agreement terms. Q4's second term renewal notice was always accompanied by a request for reduction of the minimums, and thus was substantively insufficient. The arbitration panel found that Q4 did not agree to the minimums in the License Agreement until September 2017, well after the cut-off date of June 30, 2017. The arbitration panel found that the written notice given by Q4 "was not the clear, unqualified notice of its 'desire to renew' required by contract: the notice given requested changes in two material terms that had been agreed to and memorialized six years earlier."

The arbitration panel's reasoning is not irrational, and the arbitration panel did not exceed its power in reaching this determination. The court does not believe that the arbitration panel rewrote the contract between the parties when it determined that a notice of intent to renew required Q4 to agree to the material terms of the contract. The License Agreement states that for the second term renewal, the "Licensee [must notify] in writing Licensor, certified mail return receipt requested, of its desire to renew *this Agreement* no later than June 30, 2017" (emphasis added). Q4 never notified DPI of its desire to renew the license agreement, rather it notified DPI of its desire to enter into a new agreement with new material terms. A contract is defined by its material terms; an agreement does not exist if the contract is not "definite enough in its terms" (*Four Season Hotels v. Vinnik*, 127 AD2d 310 [1st Dept 1987]).The notice that Q4 gave to DPI did not express a desire to renew the agreement that it had memorialized six years earlier because by requesting lower minimums it changed the material terms of the contract.

Therefore, the arbitration panel's determination that Q4 never properly noticed DPI of its intent to renew for the second renewal term was not irrational and the arbitration panel did not exceed its power in interpreting the License Agreement accordingly.

Next, Q4 argues that the arbitration panel engaged in misconduct when it failed to enforce Order no. 14 which directed DPI to provide "all documentation reflecting/containing the information concerning... DPI's taking of the respective order(s), shipment, invoicing, and payment" with respect to its breach of exclusivity. Q4 asserts that in the final award, the arbitration panel makes multiple references to Respondent's lack of candor, but instead of allowing a forensic examination of its books, as the panel alluded to in Order No. 14, the panel instead stated that: 1) there was no contractual basis for an accounting; 2) there was no fiduciary relationship which is required for an accounting; and 3) the time for such an accounting was during discovery, not after the hearing was completed. Q4 argues that this outcome directly contravenes Order No. 14 and renders the arbitration panel's decision a product of misconduct.

DPI responds that the arbitration panel did not commit misconduct by not ordering an accounting because the accounting considered in Order No. 14 was conditional on the arbitration panel's satisfac-

tion with DPI's production of relevant sales records. Additionally, DPI argues that Q4 had a full and fair opportunity to argue its right to an accounting, and that the arbitration panel decided, after giving Q4 an opportunity to present its arguments, that a post-hearing accounting would be inappropriate.

Once again, the court agrees with DPI.

Order No. 14 states, in relevant part, that DPI would provide Q4 with various forms of documentation concerning sales records during the initial term and the first renewal term with Q4 and that:

> one of Claimant's possible remedies if it proved Respondent's alleged liability and the Panel decided Respondent had not been sufficiently forthcoming with information about its relevant sales would be forensic examination of Respondent's books. In so saying, the Panel notes that there are still two more scheduled evidentiary Hearing days and the evidence received then may, along with the evidence already of record, provide a sufficient evidentiary record to allow the Panel to proceed to a complete final award regardless of its determination on liability.

Post-hearing, Q4 sought an accounting "as to DPI's sales of innerwear during the term of the License Agreement and all DPI shipments of children's wear sold by CPI to Costco in violation of Q4's exclusive rights..." pursuant with Order No. 14. The arbitration panel denied Q4's request for an accounting for three reasons. First, the arbitration panel stated that there is no contractual basis for an accounting and there is adequate legal remedy in awarding damages. Second, the arbitration panel stated that an accounting would be inappropriate because there is no fiduciary relationship between the parties. Third, the arbitration panel asserted that the correct time to ask for additional discovery was before or during the hearing, not after the hearing had ended.

The court does not find any misconduct or irrationality in the arbitration panel's actions. First, even assuming *arguendo* that Q4 successfully proved DPI's alleged liability and that the panel decided that DPI had not been sufficiently forthcoming in information about relevant sales, Q4 is still not entitled to an accounting. The order stated that a forensic examination of DPI's books was a "possible" remedy, not a definite remedy. Q4 is not entitled to this remedy. Contrary to Q4's assertion, the arbitration panel could deny an accounting without contradicting itself.

Second, Order No. 14 conditions the possible remedy of a forensic examination of DPI's books on whether Q4 proves DPI's alleged liability and whether the panel feels that DPI was forthcoming with information about its relevant sales. Here, the arbitration decision demonstrates that the panel believed that DPI had been sufficiently forthcoming in its relevant sales to allow the panel to fairly determine damages for all sales that had occurred in violation of Q4's exclusive rights. The panel determined that the only such sales in violation of Q4's exclusive rights that were sufficiently proved concerned "DPI's 'small insignificant shipment' to Costco" and that sufficient evidence existed to calculate damages for that shipment. The arbitration panel stated that damages for DPI's shipment to Costco "are available and would be adequate." Therefore, the conditions in Order No. 14 which would possibly trigger an accounting were never met, and the arbitration panel did not commit misconduct or act irrationally.

Based on the foregoing, Q4 has failed to establish that the arbitration panel exceeded its power or that it committed any misconduct and is not entitled to vacatur of the arbitration award. Consequently, Q4's petition to vacate must be denied. "Upon the denial of a motion to vacate or modify, [a court] shall confirm the award" (CPLR § 7511[e]). Therefore, DPI's petition to confirm is granted and the arbitration award is confirmed.

Accordingly, it is hereby

ORDERED that Q4's petition to vacate in the action with index no. 651258/2023 is denied in its entirety, and it is further

ORDERED that DPI's petition to confirm in the action with index no. 651116/2023 is granted in its entirety, and it is further

ORDERED that the arbitration award is confirmed in its entirety.

Settle judgment on notice.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 8/24/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.