Browning v DM Tellock & Assoc., PLLC
2023 NY Slip Op 33037(U)
August 31, 2023
Supreme Court, New York County
Docket Number: Index No. 652528/2023
Judge: Kathleen Waterman-Marshall

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHLEEN WATERMAN-MARSHALL** **PART** **09M**

Justice

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YVONNE RAMIREZ BROWNING

Plaintiff,

- v -

DM TELLOCK & ASSOCIATES, PLLC,

Defendant.

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INDEX NO. 652528/2023

MOTION DATE 05/25/2023, 06/29/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10 were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14 were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Consolidation is Granted

Under motion sequence 002, respondent seeks an order consolidating this action with *DMT & Associates v. Yvonne Ramirez-Browning*, NY Index. No. 653003/2023, also pending in this Court. The motion is unopposed.

Consolidation rests within the discretion of the Court and is appropriate where two actions involve "a common question of law or fact" (CPLR § 602[a]); the burden is on a party resisting consolidation to show that consolidation would be prejudicial (*Vigo S. S. Corp. v. Marship Cop.*, 26 NY2d 157 [1970]). Courts are inclined to award consolidation where it promotes efficiency and judicial economy (*Amcan Holdings, Inc. v. Torys LLP*, 32 AD3d 337 [1st Dept 2006]).

As relevant here, petitioner Browning filed the instant petition on May 26, 2023, seeking to confirm the subject arbitration award. Thereafter, on June 22, 2023, respondent DMT & Associates[1] (hereinafter "DMT") filed a separate action seeking to vacate the subject arbitration award (NY Index No. 653003/2023 NYSCEF Doc. No. 1). These two matters inarguably arise out of the same arbitration proceeding and therefore raise identical questions of law and fact; consequently, consolidation is appropriate and DMT's motion, sequence 002, is granted.

[1] There is no dispute that DMT & Associates and DM Tellock & Associates are the same entity for the purposes of these two actions. A review of the Department of State Corporate Entity Search reveals no entity with the name "DMT & Associates"; however, "DM Tellock & Associates" is registered with the Department of State.

The Arbitrator's Award is Confirmed

Having consolidated the matter, the Court turns to the underlying confirmation and vacatur petitions. For the purposes of resolution the Court deems the petition of Browning to be the operative petition in this consolidated mater, under motion sequence 001, and deems the petition of respondent DMT to be a vacatur cross-motion to the petition.

As relevant here, petitioner was previously employed by Wells Fargo Bank. After her position was eliminated due to downsizing and outsourcing, she sought to continue performing this same work for an outside law firm on behalf of Wells Fargo; however, same required employment with a firm approved by Wells Fargo. Petitioner became employed by respondent, who had been approved to perform work on behalf of Wells Fargo, on an "Of Counsel" basis. Under this arrangement, petitioner retained, *inter alia*, 70% of the legal fees she earned for work on behalf of Wells Fargo in California. Thereafter, Wells Fargo removed respondent from its list of approved firms, and petitioner left the employ of respondent in order to continue working on behalf of Wells Fargo.

During the underlying arbitration, petitioner alleged that she had not been paid for work performed on behalf of Wells Fargo as an employee of respondent. Respondent argued that petitioner improperly retained its 30% share of fees earned while she remained under its employ, prior to the matters' transfer from respondent law firm to petitioner. The arbitration award found neither party had complied with the employment agreement and directed each to remit a portion of the fees pursuant to the agreement. As the agreement provided that petitioner retained 70% of fees, with respondent retaining the remaining 30%, the arbitration award was in favor of petitioner.

CPLR § 7510 provides that the Court shall confirm an arbitration award upon application of a party made within one-year following the award, unless the award is vacated or modified in accordance with CPLR § 7511. Confirmation is summarily granted unless vacatur or modification is raised by a party, or the application to confirm is untimely (*see generally Bernstein Family Ltd. Partnership v. Sovereign Partners L. P.*, 66 AD3d 1 [1st Dept 2009]; Practice Commentary CPLR § 7510).

CPLR § 7511 provides that within 90 days of service of an arbitrator's award, a party may seek to vacate the award where the party's rights were prejudice by (i) corruption or fraud, (ii) partiality of the arbitrator, (iii) an arbitrator acting in excess of their authority or imperfectly executing their authority such that the final award did not address the subject of the arbitration proceedings, or (iv) by the arbitrator's failure to follow the procedures of Article 75 of the CPLR. Likewise, where a strong public policy is violated by the award or the award is irrational, vacatur is proper (*In Re Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 NY3d 530 [2010]). These grounds are exclusive and narrowly applied, "Courts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined" (*Goldfinger v. Lisker*, 68 NY2d 225 [1986]; *see also Geneseo Police Benevolent Assn. v. Village of Geneseo*, 91 AD2d 858 [4th Dept 1982] *aff'd* 59 NY2d 726 [1983]). Consequently, errors of law or fact do not form a basis to vacate an arbitrator's award (*Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 NY3d 471 [2006]; *Transport Workers' Union of Am., Local 100, AFL-CIO*, 6

NY3d 332 [2005]). Where vacatur of an arbitration award is sought on the basis of manifest disregard of a contract, vacatur is appropriate if the award contradicts express and unambiguous term(s) of the contract (*Nexia Health Technologies, Inc. v. Miratech, Inc.*, 176 AD3d 589 [1st Dept 2019]). However, vacatur under this doctrine is one of last resort and only applicable to the "rare occurrences of apparent egregious impropriety" by the arbiter (*id.*). Consequently, "[a]n arbitration award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached" (*Susan D. Settenbrino, P.C. v. Barroga-Hayes*, 89 AD3d 1094 [2d Dept 2011] quoting *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 NY3d at 479 [internal quotation removed]). Simply put, it is well established that an arbitrator's award is largely unreviewable by this Court (*In re Falzone*, 15 NY3d at 534).

The Court declines respondent DMT's invitation to vacate the arbitration award based on an alleged error of law. The Court need not determine whether the arbitration award at issue suffers from an error of law given that errors of law are not a sufficient basis to vacate an arbitration award (*see e.g. Wien & Malkin LLP v. Helmsley-Spear, Inc.*, *supra*). Respondent's argument, although styled as alleging an excess of authority, amounts to a disagreement with the arbiter's determination of applicable law and relevant facts thereto; this is tantamount to a claim that the arbiter misapplied the law and facts, and is insufficient to vacate an award.

To the extent that respondent alleges the arbitration award is internally inconsistent, ambiguous, and therefore does not finally resolve the issue presented sufficient to vacate the award, this Court disagrees. Respondent's argument on this issue is chiefly devoted to the fees of the arbitration and distribution thereof. As relevant here, the award provides that the parties shall equally bear the costs associated with the arbitration proceeding. That the arbitration award, in determining the equal share, found petitioner had contributed $1,608.75 in excess of her equal share, and directing respondent refund petitioner in this amount, is neither ambiguous nor inconsistent. In any event, internal inconsistencies within an arbitral judgment are not grounds for vacatur of same (*Daesang Corp. v. NutraSweet Co.*, 167 AD3d 1 [1st Dept 2018]).

Finally, to the extent that respondent alleges the arbiter committed egregious impropriety by manifestly disregarding the express terms of the contract, the Court disagrees. The award found that neither party had complied with their contract and awarded each party a portion of the legal fees in accordance with their agreement. This is not an egregious impropriety or manifest disregard of the parties' agreement's terms.

To be sure, the arbitration award at issue represents a bare bones approach to resolution of the parties' dispute, providing little more than a recitation that the arbiter reviewed the parties' papers and decretal language. Nevertheless, this suffices as a "barely colorable justification for the outcome reached" (*Susan D. Settenbrino, P.C. v. Barroga-Hayes*, *supra* quoting *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, *supra*). Having found vacatur of the arbitration award inappropriate, the Court must confirm the arbitration award (CPLR § 7511[e]; *see also Matter of Board of Educ. of Ardsley Union Free School Dist., Town of Greenburgh v. Ardsley Congress of Teachers*, 78 AD2d 879 [2d Dept 1975]).

Accordingly, it is

ORDERED that motion sequence 002 is granted and the above-captioned action is consolidated in this Court with *DMT & Associates v. Yvonne Ramirez-Browning*, NY Index. No. 653003/2023, pending in this Court; and it is further

ORDERED that the consolidation shall take place under Index No.652528/2023 and the consolidated action shall bear the following caption:

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YVONNE RAMIREZ BROWNING
petitioner
-against-
DM TELLOCK & ASSOCIATES, PLLC
respondent
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; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court, who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that counsel for the movant shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office, who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the aforesaid *Protocol*; and it is further

ORDERED that the petition, motion sequence 001 is granted, the cross-motion to vacate is denied, and the arbitrator's award rendered in favor of petitioner and against respondent in the amount of $76,124.00 ($74,515.25 under the contract + $1,608.75 paid in excess of petitioner's share of arbitration costs) is confirmed; and it is further

ORDERED that it appearing to the Court the address of petitioner and respondent has not been provided in either matter, the Court cannot issue a final order resolving this matter sufficient for the Clerk of the Court to enter judgment; and it is further

ORDERED that petitioner shall submit order, via NYSCEF with courtesy copy via first class mail or hand delivery to Courtroom 289 at 80 Centre Street New York, NY 10013 within 10 days of this decision or the relief granted herein may be deemed waived; and it is further

ORDERED that, as a courtesy, the order submitted by petitioner shall contain the following form language:

> ORDERED, ADJUDGED, and DECLARED that petitioner, YVONNE RAMIREZ BROWNING, having an address at ____________, does recover from respondent DM TELLOCK & ASSOCIATES, PLLC, having an address at ______________ the amount of $76,124.00 plus interest at the rate of 9% per annum from the date of March 27, 2023, the date of the arbitration award, as computed by the Clerk together with costs and disbursements as taxed by the Clerk; and it is further
>
> ORDERED that judgment shall be submitted to the Clerk of the Court, and not to chambers, unless directed otherwise by that office

; and it is further

ORDERED that any requested relief not expressly addressed herein has nevertheless been considered and is hereby denied.

20230831165128KCWATER5 [signature]

8/31/2023	
DATE	KATHLEEN WATERMAN-MARSHALL, J.S.C.

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