UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EYEWONDER, Inc.,

Plaintiff,

-against-

JOHN ABRAHAM,

Defendant.

MEMORANDUM DECISION
AND ORDER
08 CV 3579 (GBD)

GEORGE B. DANIELS, United States District Judge:

Plaintiff EyeWonder, Inc. moves to confirm an arbitration award ("Award") against EyeWonder Inc.'s former Regional Vice President of Sales, Defendant John Abraham. Defendant Abraham cross-moves to vacate or modify the Award, pursuant to 9 U.S.C. § 10(a). Plaintiff's motion to confirm is granted. Defendant's motion to vacate or modify the Award is denied.

Background

Plaintiff and Defendant entered into an Employment Agreement dated June 1, 2007. The Employment Agreement contained restrictive covenants which included non-solicitation of Plaintiff's employees, non-solicitation of Plaintiff's customers, and a restrictive covenant limiting Defendant's ability to procure employment in certain geographical areas for a one-year period after employment. The Employment Agreement also contained a non-disclosure provision which prohibited Defendant from disclosing confidential information for a two-year period after employment.

Section 8(a) of the Employment Agreement contained a binding arbitration provision which stated that "any controversy or claim arising out of or relating to this Agreement, or the breach thereof, including but not limited to a claim based on or arising from an alleged tort, shall

be settled by binding arbitration held in Atlanta, Georgia in accordance with the Commercial Arbitration Rules of the American Arbitration Association." The Employment Agreement also contains a choice of law provision which states that "[t]his Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York, *without* regard to its conflict of laws rules."

In early 2008, Defendant began looking for new employment because he was dissatisfied with his proposed 2008 compensation plan. Eyeblaster, a direct competitor of Plaintiff EyeWonder with sales offices in New York and Los Angeles, offered Defendant the role of Vice President, West Coast Operations. Defendant never disclosed to Plaintiff that he had accepted an executive position with Eyeblaster. On March 21, 2008, Defendant gave Plaintiff two weeks notice of his resignation. Defendant told Plaintiff he was going to a mobile startup company. Defendant admitted that he lied to Plaintiff when he made that statement. After joining Eyeblaster, Defendant acknowledged soliciting three of Plaintiff's sales personnel to follow him to Eyeblaster. He also solicited at least one of Plaintiff's customers. On April 8, 2008, Plaintiffs learned that Defendant had accepted the job at Eyeblaster.

On April 14, 2008, Plaintiff filed its "Verified Complaint for Injunctive Relief in Aid of Arbitration."[1] On April 28, 2008, Plaintiff initiated arbitration against Defendant for alleged violation of the Employment Agreement. The parties subsequently engaged in arbitration discovery and filed pre-hearing briefs. On August 4, 2008, Defendant filed a cross-motion to

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[1]Plaintiff alleged, *inter alia*, that Defendant violated restrictive covenants, in the Employment Agreement, which included non-solicitation of company employees, non-solicitation of company customers, and a restrictive covenant limiting Defendant's ability to procure employment in certain geographical areas for a one-year period after employment. Plaintiff also alleged that Defendant breached a non-disclosure provision which prohibited Defendant from disclosing confidential information for a two-year period after employment.

stay the arbitration on the basis that the arbitration clause was invalid under California law and should not be enforced. Defendant argued that, despite the New York choice of law provision, California law should apply. He claimed that under a required application of California law, the arbitration clause contained in his Employment Agreement was procedurally and substantively unconscionable.[2] By order dated December 1, 2008, this Court denied Defendant's motion to stay the arbitration hearing scheduled for December 3-5, 2008, finding that Defendant had not demonstrated irreparable harm[3] and failed to demonstrate a likelihood of success on the merits of his claim that the arbitration clause is "unconscionable under a required application of California law."[4] This Court ruled that the "arbitrator has full authority to determine the enforceabilty of the

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[2] "Under California law, an arbitration [provision], like any other contractual clause, is unenforceable if it is both procedurally and substantively unconscionable." Pokorny v. Quixtar, Inc., 601 F.3d 987, 996 (9th Cir. 2010). In determining procedural unconscionability, "California law, focuses on the factors of surprise and oppression in the contracting process, including whether the contract was one drafted by the stronger party and whether the weaker party had an opportunity to negotiate." Id. If "the weaker party is presented the [arbitration] clause and told to take it or leave it without the opportunity for meaningful negotiation," then it is procedurally unconscionable. See id. In determining substantive unconscionability, California courts focus on "the fairness of the term in dispute." Id. "The focus of the inquiry is whether the [arbitration provision] is one-sided and will have an overly harsh effect on the disadvantaged party." The party who is opposing the arbitration "has the burden of proving the arbitration provision is unconscionable." Omstead v. Dell, Inc., 594 F.3d 1081, 1086 (9th Cir. 2010).

[3] Plaintiff had paid the filing fee to initiate arbitration and Defendant's share of the arbitration costs, totaling $7,923.

[4] The limited issue before this Court at the time it issued its December 1, 2008 Order, was whether Defendant had met its burden for injunctive relief. This Court found that Defendant had failed to meet its burden and denied the motion to stay the arbitration. It is worth noting that Plaintiff did not bring a motion to compel arbitration, and that Defendant fully participated in the arbitration proceedings initiated by Plaintiff for months before Defendant sought injunctive relief to stay the ongoing proceedings.

contract and the application of its provisions."[5]

The arbitrator issued its Award on February 10, 2009. The Award found that Defendant materially breached various provisions of the Employment Agreement by, among other things, competing with Plaintiff in the prohibited geographic territory, soliciting Plaintiff's customer, and soliciting Plaintiff's employees.[6] The arbitrator further found that "the entire record of the arbitration supports ordering Mr. Abraham to bear all of the costs of this arbitration."[7] The arbitrator found Defendant liable to Plaintiff for $19,086.35 – "for the costs of the arbitration, plus any costs" and $159,603.37, for Plaintiff's attorneys' fees and expenses.[8]

Defendant does not contend that the arbitrator was incorrect in finding that his behavior did in fact materially breach the restrictive covenants contained in the Employment Agreement.

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[5]The arbitrator also determined that "Section 8(a) of the Employment Agreement provides that '[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof . . . shall be settled by binding arbitration . . . in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the 'AAA') . . . . Section 8(b) of the Employment Agreement specifies that '[t]he United States Arbitration Act and federal arbitration law shall govern the interpretation, enforcement and proceedings pursuant to the arbitration clause set forth in this Section 8. AAA Commercial Arbitration Rule 7(a), in turn, commits 'arbitrability' disputes to the arbitrator: 'The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

[6]"Based on the evidence presented, the arbitrator finds that Mr. Abraham has materially breached various provisions of his Employment Agreement with EyeWonder."

[7] The arbitrator found that "Mr Abraham materially breached the Agreement and unreasonably resisted the arbitration process. Consequently, based on the entire record of this arbitration, the arbitration finds that Mr. Abraham should pay all of EyeWonder's attorneys' fees and expenses incurred in and apportioned to this arbitration."

[8]The arbitrator also dismissed Defendant's counterclaims explaining, "Mr. Abraham has counterclaimed against EyeWonder, alleging fraudulent inducement of the restrictive covenants; asserting a statutory unfair competition claim under California's Unfair Competition Law; and claiming intentional interference with prospective economic advantage. Said counterclaims are without merit and are dismissed."

Rather, Defendant contends that the Award should be vacated on three grounds, that: 1) the arbitration agreement was invalid under California unconscionability law; 2) the arbitrator exceeded his authority and acted in manifest disregard of California law by awarding attorneys's fees and arbitration costs; and 3) the commercial arbitration rules were not followed in selecting the arbitrator.

Standard of Review

Under the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. ("FAA"), the statutory grounds for vacatur are very narrow. 9 U.S.C. § 10a(1)-(4). Subsection 4 of section 10 of the FAA, permits courts to vacate an arbitration award "where the arbitrators have exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Id. The district court may also vacate an arbitral award when it exhibits a "manifest disregard' of the law. In the Second Circuit, "a litigant seeking to vacate an arbitration award based on alleged manifest disregard of the law bears a heavy burden . . . . [A]wards are vacated on grounds of manifest disregard only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator [] is apparent." T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2d Cir. 2010) (internal quotations and citations omitted). Impropriety in this context, "has been interpreted clearly [to] mean[] more than error or misunderstanding with respect to the law, or an arguable difference regarding the meaning or applicability of laws urged upon an arbitrator." Id. (internal citations and quotations omitted). Arbitration awards "should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification for the outcome reached*." Id. (emphasis added). The Second Circuit has further explained that "[w]ith respect to contract interpretation,

[the manifest disregard of the law] standard essentially bars review of whether an arbitrator misconstrued a contract.[9] Id.

Choice of Law and Validity of the Arbitration Clause

Defendant challenges the Award arguing that under California law, there was no valid enforceable agreement to arbitrate. However, California law does not apply. The Employment Agreement contains a choice of law provision which states that "[t]his Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York, *without* regard to its conflict of laws rules." Defendant contends that, despite the New York choice of law provision in the Employment Agreement, this Court should find that California law applies because it has more significant contacts. He argues that the arbitration provision is unenforceable because it is substantively and procedurally unconscionable under California law.[10] "In a diversity action, a district court is required to apply the choice of law rules of

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[9] The Second Circuit has recognized three components in the "application of the manifest disregard standard: First, we must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators. An arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Thus, misapplication of an ambiguous law does not constitute manifest disregard. Second, . . . we must find that the law was in fact improperly applied, leading to an erroneous outcome. . . . Even where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts of the case. Third, . . . we look to a subjective element, that is, the knowledge actually possessed by the arbitrators. In order to intentionally disregard the law, the arbitrator must have known of its existence, and its applicability to the problem before him." apparent." T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2d Cir. 2010) (quoting Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 93 (2d Cir. 2008)).

[10] Defendant argues that the arbitration provision is procedurally unconscionable under California law because it was "part of an unlawful contract of adhesion." Defendant further contends that the arbitration provision which provides that "[t]he parties shall share all costs of

the state in which it sits. New York law is clear in cases involving a contract with an express choice-of-law provision: Absent fraud or violation of public policy, a court is to apply the law selected in the contract so long as the state selected has sufficient contacts with the transaction." Cap Gemini Ernst & Young U.S. LLC v. Nackel, No. 02 Cv. 6872(DLC), 2004 U.S. Dist LEXIS 4492, at *8 (S.D.N.Y. Mar. 23, 2004), (internal quotation omitted) aff'd, 98 F. App'x 65 (2d Cir. 2004) (citing Hartford Fire Ins. Co. v. Orient Overseas Containers Lines, 230 F.3d 549, 556 (2d Cir. 2000).

Here, EyeWonder's main sales office is located in New York. Defendant's direct supervisor is located in New York. Defendant and his supervisor maintained daily contact via email and calls. Defendant also supervised a team in California that collaborated often with counterparts in the New York office. Prior to signing the employment agreement, Defendant visited the main sales office in New York, meeting his direct supervisor and the Northeast sales team. There are sufficient contacts supporting a sufficiently reasonable relationship between the transaction and New York.[11] Accordingly, New York law applies and the Arbitrator was correct

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arbitration, but each party shall be responsible for its respective attorneys' costs, fees and expenses, unless the arbitrators otherwise determine" is substantively unconscionable under California law because the employee *could* end up paying all fees and costs. Since this Court finds that New York law applies, Defendant's arguments that the arbitration provision is unconscionable under California law is unavailing, and need not be addressed.

[11] Defendant's primary argument is that California has more significant contacts to the matter and this Court should disregard the choice of law provision. As was recently explained in Cap Gemini Ernst & Young U.S. LLC v. Nackel, No. 02 Cv. 6872(DLC), 2004 U.S. Dist LEXIS 4492, at *8 (S.D.N.Y. Mar. 23, 2004), aff'd, 98 F. App'x 65 (2d Cir. 2004), "[i]t would be inappropriate to judge which state has the most significant contacts with this dispute and perhaps as a result of that analysis to disregard the choice-of-law provision in the Employment Agreement, since the choice of New York law satisfies the . . . more recent standard articulated by the New York courts and applied by the Second Circuit where a contract contains a choice-of-law provision." An evaluation of whether or not California has more significant

in applying New York law, and not California law.[12] Therefore, California law of unconscionability does not apply to, nor can it invalidate, the arbitration clause. California law cannot be relied upon to vacate the arbitrator's Award.

Attorneys' Fees and Arbitration Costs and Fees

Defendant argues that if this Court finds the arbitration provision is valid, the Award should still be vacated on the basis that the arbitrator exceeded his authority by awarding Plaintiff attorneys' fees and arbitration costs.[13] Plaintiff contends that the arbitrator improperly granted the attorneys' fees and costs to Plaintiff in order to punish Defendant for exercising his federal rights to stay the arbitration. Specifically, Defendant argues that the arbitrator acted outside the scope of his authority because he arbitrator awarded attorneys' fees "because of Abraham's alleged unreasonable resistance to the arbitration process." Plaintiff maintains that "even if the arbitration provision authorized the Arbitrator to award fees for the Arbitration itself, the Arbitrator had no authority to award fees for Abraham's resistance to the arbitration in this Court."

As the Second Circuit has explained, this Court's limited inquiry under 9 U.S.C. §

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contacts is irrelevant since the Employment Agreement in this action contains a New York choice of law provision and there are sufficient contacts with New York.

[12] The arbitrator concluded that "[t]he arbitration provisions contained in the Employment Agreement are valid and enforceable, and are neither procedurally nor substantively unconscionable."

[13] Defendant reiterates his unconscionability argument contending that the Award should be vacated because the arbitrator acted in manifest disregard of California law when it awarded attorneys' fees and arbitration costs. Any such argument goes to the validity of the arbitration provision which this Court has already disposed of, finding that New York law applies and the arbitration clause is valid under New York law. Defendant makes no argument that awarding attorneys' fees and costs in this context is unconscionable under New York law.

10(a)(4) "focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, *not whether the arbitrators correctly decided that issue*." T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 346 (2d Cir. 2010) (emphasis added) (citing Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 220 (2d Cir. 2002). "The scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission." Synergy Gas Co. v. Sasso, 853 F.2d 59, 63-64 (2d Cir. 1988). Section 8 of the Employment Agreement provides that "[t]he parties shall share all costs of arbitration, but each party shall be responsible for its respective attorneys' costs, fees and expenses, *unless the arbitrators otherwise determine*." (emphasis added). Accordingly, the parties' contract provides that the arbitrator has the authority to order one side to pay attorneys' fees at the arbitrator's discretion. Moreover, "where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate." Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003).

Based on the Employment Agreement, it was within the arbitrator's power to shift attorneys' fees and arbitration costs. "In evaluating a challenge to an arbitration award, . . . the arbitrator need only explicate his reasoning under the contract in terms that offer even a barely colorable justification for the outcome reached in order to withstand judicial scrutiny." Millicom Int'l V N.V., v. Motorola, Inc., 01 Civ. 2668 (SHS), 2002 U.S. Dist. LEXIS 5131, at *17 (S.D.N.Y. March 28, 2002). In his Award, the arbitrator found that "[t]he entire record of the arbitration supports ordering [Defendant] Abraham to bear all of the costs of this arbitration." The arbitrator's determination that Defendant "materially breached the Agreement and

unreasonably resisted the arbitration process" does not invalidate the arbitrator's ruling or require this Court to vacate the Award.[14] The arbitrator was within his power under the Employment Agreement to shift all costs and did not exceed his authority by permitting Plaintiff to recover monies it spent on attorneys' fees in the arbitration, and arbitration costs and fees.[15]

Injunctive Relief

The Award also enjoined Defendant from behavior that would violate the Employment Agreement.[16] Defendant contends that the arbitrator exceeded his authority in ordering injunctive relief. Section 7 of the Agreement, entitled "Injunctive Relief," states that "Employee agrees that Company, in addition to any other rights and remedies available to it, shall be entitled to obtain an immediate injunction (whether temporary or permanent) from any court of

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[14] Arbitrators may award attorneys' fees and/or arbitration costs, to the extent they are permitted in the relevant arbitration provision or agreement. See e.g. PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1199 (2d Cir.) (Rule 43(d) of the AAA's Commercial Rules provides that "[t]he award of the arbitrators(s) may include: an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement"); PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1202 (S.D.N.Y. 1996) (explaining that an arbitrator has the right to arbitrate claims for attorneys' fees where the agreement expressly so provided).

[15] In his reply papers, Defendant also contends that the arbitrator exceeded his authority and disregarded the law in awarding attorneys' fees as punitive damages. There is no evidence in the record that the arbitrator granted attorneys' fees as punitive damages, nor is there any indication that Plaintiff requested attorneys' fees to punish Defendant.

[16] "Mr. Abraham is enjoined from soliciting or servicing, directly or indirectly, any of the EyeWonder customers. . . until April 4, 2009. Mr. Abraham is enjoined from selling or soliciting for sale services to deliver video or other rich media advertisements over the Internet or over wireless networks until April 4, 2009. Mr. Abraham is enjoined from soliciting any EyeWonder employee to leave EyeWonder until April 4, 2009. Mr. Abraham is enjoined from using or disclosing EyeWonder's confidential information until April 4, 2010."

appropriate jurisdiction . . . ."[17] Defendant Abraham argues that this Court should vacate the injunctive portion of the Award because the Agreement states that the Court has authority to grant injunctive relief.[18] The arbitrator, however, reasonably interpreted that the Employment Agreement as permitting the arbitrator to determine the propriety of specific performance or injunctive relief.[19] In light of the presumption toward confirming an arbitration award, and absent specific justification for vacating the arbitrator's determination that injunctive relief was appropriate, this Court confirms the Award and issues an order granting injunctive relief.[20]

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[17] Defendant also contends that the arbitrator exceeded his authority because the Award ignores the geographical limitation of the non-compete provision. Section 6(f) of the Employment Agreement states that competition is prohibited, "within 20 miles of, the city limits of Los Angeles or San Diego, CA . . ." The Arbitrator mentioned the limitation but did not explicitly repeat it in the section granting specific awards. In the absence of any indication that arbitrator intended to enforce a more extensive non-compete provision than the one contemplated by the parties, there is no need to disturb the Award.

[18] Notably, Defendant's Cross Motion to Vacate the Award was filed on March 6, 2009 – three weeks before many of the one-year contractual prohibitions would have expired. Further, Defendant does not contend that the arbitrator was incorrect in finding that such behavior did in fact violate the restrictive covenants in the Employment Agreement. In any event, those one and two-year restrictions in the Award having already expired, Plaintiff's application to vacate injunctive relief enforcing the restrictions is moot.

[19] "Mr. Abraham has argued that this provision effectively precludes the arbitrator from awarding any form of injunctive relief. Judge Daniels of the United States District Court for the Southern District of New York disagreed, ruling that 'the arbitrator has full authority to determine the enforceability of the contract and the application of its provisions.' The undersigned arbitrator concludes that the clause was intended only to authorize preliminary injunctive relief from a court, and cannot reasonably be read to preclude a final award of specific performance by the arbitrator. Accordingly, the arbitrator is empowered to award specific performance or other permanent injunctive relief, in cases such as the current arbitration, where monetary damages are inadequate to compensate a former employer for breach of restrictive covenant."

[20] In any event, it is undisputably within this Court's authority to order injunctive relief consistent with the arbitrator's determination that such relief is appropriate.

Conclusion

Plaintiff's motion to confirm is granted. Defendant's motion to vacate is denied. The arbitration Award is confirmed in its entirety.[21]

Dated: New York, New York
September 3, 2010

SO ORDERED:

George B Daniels

GEORGE B. DANIELS
United States District Judge

[21] Defendant's final argument for vacatur is that the American Arbitration Association ("AAA") failed to follow its commercial arbitration rules in selecting the arbitrator. Defendant challenges the arbitrator selection process arguing that the arbitrator was chosen from the "Employment Dispute Resolution Panel" rather than from the "National Roster of Commercial Arbitrators," as required under the AAA rules. Plaintiff argues that Defendant waived his objection and note that the objection is much ado about nothing since the arbitrator selected was, in fact, listed on both the "Employment Dispute Resolution Panel" and the National Roster of Commercial Arbitrators." Defendant's objections were raised to the AAA, were rejected, and the arbitrator was reaffirmed. The Assistant Vice-President for the AAA stated in a letter to Defendant that the arbitrator was selected in accordance with their rules. This Court sees no reason to depart from the conclusion made by the Assistant Vice-President who is most familiar with their rules. See e.g. Appel Corp. v. Katz, No. 05-6697-cv, 2007 U.S. App. LEXIS 2541, at **3 (2d Cir. Feb. 7. 2007) ("In light of the American Arbitration Association (AAA) rule vesting it with the authority to interpret and apply its own rules, parties are obligated to comply with the AAA's determinations so long as they are within reasonable limits."). Furthermore, Defendant's assertion that he was prejudice because the arbitrator was a "management-side employment attorney" and that he was "denied his contractual right to pick an arbitrator from the "National Roster of Commercial Arbitrators" is baseless, particularly since the arbitrator was in fact on the "National Roster of Commercial Arbitrators."