UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

L'OBJET, LLC,

Petitioner,

v.

SAMY D. LIMITED and SAMY DAVID COHEN,

Respondents.

11 Civ. 3856 (LBS)

MEMORANDUM & ORDER

SAND, J.

Petitioner L'Objet, LLC ("L'Objet") has moved to vacate an arbitration award rendered in favor of Respondents, Samy D. Limited and Samy David Cohen ("Samy D."), on March 9, 2011. Samy D., in turn, petitions this Court to confirm the arbitration award and seeks costs and attorney's fees. For the reasons that follow, L'Objet's motion to vacate is denied, Samy D.'s motion to confirm is granted, and Samy D.'s petition for costs and attorney's fees is denied.

I. Background

The instant action arises out of two agreements (collectively "Agreements") entered into by Cheryl Jacobson Interior Design ("CJID"), L'Objet's predecessor in interest, and Samy D. in August, 2002. The Agreements—one for the distribution of Samy D.'s ceramics, the other for the use of Cohen's name in connection with the distributed products—contained nearly identical arbitration clauses stipulating that "[a]ny controversy or claim arising out of or related to" the contracts would be arbitrated in New York. Saadi Decl. Exs. C, D. In 2003 Samy D. advised L'Objet that its studio in Israel, which was experiencing financial difficulties, could not meet demand. The parties attempted to relocate production elsewhere but nothing came of this. Despite this setback, neither party terminated the Agreements. From 2004 until 2006, which

marked the end of the Agreements, the parties "for the most part ignored each other." Saadi Decl. Ex. B.

In 2004 CJID's rights were assigned to L'Objet, which two years later commenced an action against Samy D. for beach of contract in the International Center for Dispute Resolution ("ICDR") in New York. Samy D. agreed to be bound by the arbitration in order to assert individual counterclaims against L'Objet. Four years after the arbitration proceedings were initiated, the ICDR issued a decision finding that Samy D. had breached the distribution agreement and finding further that L'Objet had engaged in copyright infringement and passing off. On March 9, 2001, the arbitrator awarded $13,365.77 against Samy D. and $109,500.00 against L'Objet.

On June 7, 2011, L'Objet petitioned this court to vacate the arbitration award, alleging that (1) the arbitrator exceeded his power, (2) the arbitrator committed misconduct in refusing to hear evidence pertinent and material to the controversy, and (3) the arbitrator acted in manifest disregard for the law. Samy D. then cross-petitioned this court to confirm the arbitration award and to award it costs and attorney's fees.

II. Standard of Review

Sections 9 and 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 9–10, impart subject matter jurisdiction to confirm or vacate an arbitration award to the United States court for the district where the award was made. *Concourse Beauty School, Inc. v. Polakov*, 685 F. Supp. 1311, 1314 (S.D.N.Y. 1988).

In this Circuit, "[a]rbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir.

1993). We are empowered to vacate an arbitral award only if one of the grounds specified in 9 U.S.C. § 10 is found to exist, *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 264–65 (2d Cir. 1989), or if the award "manifest[ly] disregard[s]" the law. *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007) (citation and quotation marks omitted). The movant bears the "heavy burden" of proving one or the other of the above-mentioned grounds. *Duferco Int'l Steel Trading v. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003).

III. Discussion

A. L'Objet's Motion to Vacate

i. Arbitrator Exceeded His Powers

Proceeding under FAA § 10(a)(4), L'Objet argues that the arbitrator "exceeded his powers" by entertaining and ruling on Samy D.'s copyright and passing off claims. The claim is that these counterclaims fall outside of the scope of the contractual language contained in the Agreements' arbitration clauses. As noted, both arbitration clauses stipulated that "[a]ny controversy or claim arising out of or related to" the Agreements be arbitrated in New York. The issue, then, is whether the copyright and passing off claims "arose out of" or were "related to" the two contracts.

In determining whether the arbitrator exceeded his powers, we look to the factual allegations in the complaint. "If the [factual] allegations underlying the claims touch matters covered by the parties' . . . agreements, then those claims must be arbitrated, whatever the legal labels attached to them." *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999) (citation and quotation marks omitted). Notwithstanding L'Objet's claims otherwise, it is therefore irrelevant that Samy D.'s

counterclaims sound in tort and not in contract. Indeed, a party cannot "avoid the broad language of [an] arbitration clause by the casting of its complaint in tort," *Collins v. Aikman Prods. Co. v. Building Sys.*, 58 F.3d 16, 18 (2d Cir. 1995), which is precisely what L'Objet seeks to do with respect to Samy D.'s counterclaims.

An arbitrator cannot be said to have exceeded the scope of his powers unless "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Wall Street Associates, L.P. v. Becker Paribas, Inc.*, 818 F. Supp. 679, 684 (S.D.N.Y. 1993), *aff'd*, 27 F.3d 845 (2d Cir. 1994). In this case, Samy D.'s counterclaims "relate to" the Agreements, since together the Agreements delineate the business relationship between L'Objet and Samy D. and specify the rights and duties of the parties with respect to the ceramics and their underlying designs. L'Objet proffers no evidence to the contrary and thus fails to show "with positive assurance" that Samy D.'s counterclaims are beyond the scope of the arbitration clauses. L'Objet's claim is without merit.

ii. Arbitrator's Misconduct

L'Objet next proceeds under FAA § 10(a)(3) to argue that the arbitrator in this case was "guilty of misconduct . . . for refusing to hear evidence pertinent and material to the controversy." The claim is that the arbitrator wrongfully excluded the affidavit of Cheryl Jacobsen ("Affidavit"), part-owner of CJID and an original signatory to the agreements. L'Objet alleges that the only reason the arbitrator excluded the Affidavit is because Jacobsen was diagnosed with cancer and the arbitrator did not want to subject an infirm woman to a deposition.

As an initial matter, L'Objet provides no evidence whatsoever for its conclusion about the arbitrator's motives for excluding the Affidavit. Regardless, L'Objet has not shown that excluding the Affidavit violated "fundamental fairness," which is the relevant standard in this

Circuit. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir 1997). The Affidavit does not show, notwithstanding L'Objet's claim to the contrary, that Samy D. had "explicitly consented to the conduct for which damages were assessed against L'Objet." Mem. Supp. Pet. Vacate Arbitration Award 10. Paragraph 18, which contains the language at issue, merely states that when Samy D.'s studio in Israel could no longer meet demand, the parties agreed to try to "pursue production in other countries." It does not say that Samy D. granted L'Objet the rights to pass off Samy D.'s designs as its own. Saadi Decl. Ex. H, at 3. Even assuming, arguendo, that paragraph 18 supports L'Objet's argument, its exclusion would not have been fundamentally unfair since the evidence was cumulative. Using nearly identical language, Elad Yifrach, L'Objet's CEO, stated in evidence that was not excluded that "[w]e decided to pursue production in countries other than Israel, at facilities which would (unlike Mr. Cohen) accept, honor, and fill our orders properly." *See* Saadi Decl. Ex. G, at 20 n.11. L'Objet's claim is without merit.

iii. Manifest Disregard

"[F]ailure on the part of the arbitrator[] to understand or apply the law" is not, on its own, sufficient for this Court to vacate an arbitral award under the "manifest disregard" test. *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892 (2d Cir 1985) (per curiam) (internal quotes omitted). Rather, the movant must show that the arbitrator both understood and correctly stated the law but simply ignored it. *Id*. at 893. Furthermore, the "governing law alleged to have been ignored by the arbitrator must be well defined, explicit, and clearly applicable." *Carte Blance (Singapore) Pte.*, 888 F.2d at 265 (2d Cir 1989). Judicial inquiry is, accordingly, very limited.

L'Objet alleges that the arbitrator ignored or unjustifiably refused to apply *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). But L'Objet provides no evidence for this claim. The record, moreover, suggests the opposite. All evidence indicates that the

arbitrator provided a carefully reasoned decision explaining why *Dastar* does not apply to the facts of this case. L'Objet's argument that the arbitrator made mere "noises of contract interpretation" is simply unfounded. L'Objet clearly disagrees with the arbitrator's conclusions, but that is an argument on the merits. Even if we too disagreed, "[w]e are not at liberty to set aside an arbitrat[or's] award because of an arguable difference regarding the meaning and applicability of laws urged upon it." *Carte Blance (Singapore) Pte.*, 888 F.2d at 265 (2d Cir. 1989). L'Objet's claim is without merit. The motion is denied.

B. Samy D.'s Motion to Confirm

Due to the parallel natures of a motion to vacate and a motion to confirm an arbitration award, denying the former implies granting the latter. *Sanluis Devs., L.L.C. v. CCP Sanluis, L.L.C.*, 556 F. Supp. 329, 333 (S.D.N.Y. 2008). Samy D.'s motion to confirm is granted.

C. Samy D.'s Petition for Costs and Fees

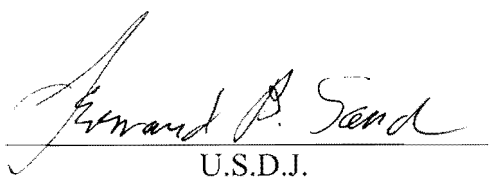
We agree with the arbitrator who found the parties to be in "mutual breach." Saadi Decl. Ex. B. We further agree with the arbitrator that both parties should bear costs and fees. Saadi Decl. Ex. A. Accordingly, we deny Samy D.'s petition for attorney's fees and costs.

IV. Conclusion

For the foregoing reasons, L'Objet's motion is denied, Samy D.'s motion to confirm is granted, and Samy D.'s petition for costs and attorney's fees is denied.

SO ORDERED.

Dated: September 29, 2011
New York, N.Y.



U.S.D.J.