UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ROBERT HAMERSLOUGH,

Petitioner,

- against -

KATHRYN HIPPLE, JONATHAN HAKALA, BRAD SEITZ and BERNARD MARKEY,

Respondents.
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MEMORANDUM AND ORDER

10 Civ. 3056 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Petitioner Robert Hamerslough ("petitioner") is a former employee of Ambassador Yellow Pages ("Ambassador"). He brings this action seeking to vacate an arbitration award granted in favor of respondent Kathryn Hipple[1] ("respondent"), chief executive officer of Ambassador Media Group LLC, the parent company of Ambassador. In opposition, respondent seeks an order confirming the award. For the reasons set forth below, petitioner's motion is denied, and respondent's cross-petition to confirm the award is granted.

BACKGROUND[2]

[1] Petitioner omitted former Ambassador officers Brad Steitz and Bernard Markey, named as defendants herein, from his Demand for Arbitration, naming only respondent Hipple and former Ambassador officer Jonathan Hakala. (Mem. of Law in Opp. to Pet. at 8.) Further, during the arbitration proceeding, petitioner discontinued his claim against Hakala. (Id.) Thus, the arbitrator's award applies only to respondent Hipple and only she moves to confirm the award. (Id.)

[2] The following facts are derived from Petitioner's Memorandum of Law in Support of Petitioner's Motion to Vacate Arbitration Award ("Mem. of Law in Supp. of Pet.") and the exhibits annexed thereto; and Respondent's Memorandum

Ambassador Media Group LLC is the publisher of various Yellow Pages directories covering the New York metropolitan area. (Mem. of Law. in Opp. to Pet. at 2.) In 2004, Ambassador, a subsidiary of Ambassador Media Group, hired the petitioner as a salesperson. (Id.) Petitioner's compensation was governed by Ambassador's written "Sales Guidelines," effective February 1, 2006, which set forth its policies with respect to sales practices and sales commissions earned by and payable to its salespersons. (Ex. C to Mem. of Law in Supp. of Pet., Ex. C at 3.) In the section entitled "Resignation or Termination," those guidelines provide:

> Should a salesperson voluntarily resign from Ambassador or be terminated for cause prior to the date of distribution of the directories for which the salesperson was engaged in sales efforts at the time of termination, the salesperson has no further right to receive payment for any unpaid commissions as of the date of termination or resignation.

(Id. at 9.)

Ambassador's Sales Guidelines also contain a mandatory arbitration clause, under the heading "Dispute Resolution," which stipulates that:

> Any disputes concerning or relating to the commissions of any salesperson shall be resolved via arbitration to be conducted in New York City at the American Arbitration Association or JAMS with a single arbitrator. No party shall have the right to recover attorneys' fees, costs or disbursements in connection with any such arbitration. Ambassador and its salespersons waive any right to proceed in any court, and any right to trial by jury, as to any

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of Law in Opposition to Petitioner's Motion to Vacate Arbitration Award ("Mem. of Law in Opp. to Pet.").

> disputes concerning commission payments. In any arbitration, discovery shall be limited to the exchange of documents and one deposition per party. The arbitral award shall be binding upon the parties.

(Id. at 10.)

During his first year of employment with Ambassador, petitioner earned a base salary of $100,000. (Mem. of Law in Opp. to Pet. at 3.) He began to earn commissions on sales in addition to his base salary in his second year of employment. (Id.) However, effective August 1, 2009, petitioner entered into a new compensation arrangement with Ambassador, which designated him an exclusively commission-based sales executive and entitled him to 25% of the "collected revenues" on all national accounts for which he had completed sales efforts. (Ex. C to Mem. of Law in Supp. of Pet., Ex. D; Mem. of Law in Opp. to Pet. at 4.)

On August 1, 2009, Ambassador began to pay petitioner his earned commissions on accounts for which it had collected customer payment, pursuant to the revised compensation agreement. (Mem. of Law in Opp. to Pet. at 7.) These payments were made to petitioner on a bi-weekly basis. (Id. at 7 n.6.) In sum, Ambassador paid petitioner gross commissions of $13,045.10 between August 1, 2009 and September 15, 2009.[3] (Ex. C to Mem. of Law in Supp. of Pet., Ex. F; Mem. of Law in Opp. to Pet. at 7

[3] Ambassador paid petitioner gross compensation between August 1, 2009 and September 29, 2009 as follows: $6,036.55 on August 15, 2009; $6,036.55 on August 31, 2009; and $972.00 on September 15, 2009. (Mem. of Law. in Opp. to Pet. at 7 n.6.)

n.6.) Petitioner then voluntarily resigned from Ambassador on September 29, 2009.[4] (Mem. of Law in Supp. of Pet. at 3.) The last payment Ambassador made to him was dated September 15, 2009. (Id.)

Petitioner filed suit in this Court on April 9, 2010, alleging violations of the Fair Labor Standards Act ("FLSA"), the New York Labor Law ("NYLL"), and New York common law for non-payment of commissions earned between the effective date of his compensation arrangement, August 1, 2009, and his voluntary resignation from Ambassador on September 29, 2009. In response, respondent moved to dismiss the action or compel arbitration pursuant to the "Dispute Resolution" provision of Ambassador's Sales Guidelines. On November 4, 2010, we dismissed the action without prejudice upon finding that all of petitioner's claims were arbitrable. (Ex. B to Mem. of Law in Supp. of Pet. at 10.)

Petitioner then filed a Demand for Arbitration Before JAMS on November 16, 2010, seeking $63,929.50 in unpaid commissions, plus liquidated damages, attorneys' fees and costs. (Mem. of Law in Opp. to Pet. at 8-9.) Primarily, petitioner sought $63,929.50 in unpaid commissions on accounts for which he had completed

[4] Though petitioner's last day of employment with Ambassador was September 29, 2009, his resignation was deemed effective October 5, 2009. (Ex. C to Mem. of Law in Supp. of Pet., Ex. D.) For purposes of this lawsuit, however, petitioner is seeking non-payment of wages for the period until September 29, 2009. (See Mem. of Law. in Supp. of Pet. at 3.)

sales efforts[5] before resigning, regardless of whether Ambassador collected revenues on those accounts before his resignation. (Ex. C to Mem. of Law in Supp. of Pet. at 4-8.) Alternatively, petitioner sought $1,669.00 in unpaid commissions on accounts for which Ambassador collected revenues before his resignation, or $580.00 in minimum wages for his final two weeks of employment with Ambassador. (Id. at 9.)

Petitioner moved for summary judgment in the arbitration proceeding on October 10, 2011, and the arbitrator issued his Final Award on December 14, 2011. (Ex. C to Mem. of Law in Supp. of Pet.) Dismissing petitioner's claim for $63,929.50 in unpaid commissions, the arbitrator concluded that petitioner was entitled to commissions only on revenues paid to Ambassador before his resignation, which totaled $1,331.00.[6] (Ex. F to Mem. of Law in Supp. of Pet. at 10.) The arbitrator accepted petitioner's interpretation of the "Resignation or Termination" provision of Ambassador's Sales Guidelines when he acknowledged that petitioner completed certain sales efforts before

[5] Petitioner only sought unpaid commissions on accounts for which he had completed all of his sales efforts before resigning. (See Ex. F to Mem. of Law in Supp. of Pet. at 9.) Petitioner argued that he completed "sales efforts" on these accounts because he concluded all attempts to sell advertisements. (Id.) Respondent did not challenge this assertion, and the arbitrator ultimately found as a matter of law that petitioner established his right to an award on that basis. (Id.)

[6] Petitioner originally sought $1,669.00 in unpaid pre-termination commissions, but the arbitrator correctly recognized that his claim included commissions on accounts for which customer payment was made to Ambassador on October 1, 2009. (Ex. F to Mem. of Law in Supp. of Pet. at 11; see also Ex. C to Mem. of Law in Supp. of Pet., Ex. B.) Because petitioner resigned on September 29, 2009, the arbitrator excluded these commissions from his Final Award. (Ex. F to Mem. of Law in Supp. of Pet. at 10-11.)

resigning, and therefore would have been entitled to commissions on those accounts if his compensation were governed solely by the Guidelines. (Id. at 8-9.) Nevertheless, he determined that petitioner was not entitled to commissions on revenues collected post-termination because petitioner's compensation agreement, effective August 1, 2009, limits his compensation to "25% of the collected revenues on all national accounts," which, by definition, excludes revenues not yet paid to Ambassador. (Id. at 13.)

Accordingly, the arbitrator granted petitioner's claim for payment of unpaid commissions only to the extent of $1,331.00, without liquidated damages, attorneys' fees, or costs, and otherwise denied petitioner's claim for payment of unpaid commissions. (Id. at 10-15.) The arbitrator also denied petitioner's claim for payment of minimum wages. (Id.) On March 9, 2012, petitioner brought this petition seeking to vacate the arbitrator's Final Award.

DISCUSSION

I. Legal Standard

Vacatur of arbitral awards is extremely rare, and justifiably so. The purpose of arbitration is to enhance efficiency and avoid costly, protracted litigation. "To interfere with this process would frustrate the intent of the parties, and thwart the usefulness of arbitration, making it

'the commencement, not the end, of litigation.'" Dufuerco Intern. Steel Trading Co. v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003) (internal citation omitted); see also Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993) ("Arbitration 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.").

Petitioner relies on three different grounds to support his motion to vacate the arbitral award. Because each ground forms the basis of multiple arguments in support of petitioner's motion to vacate, we address the legal standards for those grounds first.

1. **Statutory Grounds for Vacatur Under 9 U.S.C. § 10(a)**

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., creates a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir. 1996) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).[7] Section 10(a) of the FAA provides four grounds upon which a federal court may vacate an arbitral award:

[7] The FAA makes clear that its provisions apply to any arbitration agreement affecting interstate commerce. See 9 U.S.C. §§ 1, 2 (2012); see also Bybyk, 81 F.3d at 1198 (citing 9 U.S.C. §§ 1, 2).

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party were prejudiced; and (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)-(4) (2012).

Of the four statutory grounds for vacatur, petitioner relies solely upon the fourth, which provides that the court may vacate an award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). The Second Circuit has "'consistently accorded the narrowest of readings' to the FAA's authorization to vacate awards pursuant to § 10(a)(4)." T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 342 (2d Cir. 2010) (quoting Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003)). When deciding whether an arbitrator exceeded his powers, the inquiry "focuses on whether the arbitrators had the power, based on the parties' submissions or on the arbitration agreement, to reach a certain issue." Banco de Seguros del Estado, 344 F.3d at 262 (internal citation omitted); see also ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co., 564 F.3d 81, 85 (2d Cir. 2009).

Notably, when reviewing a motion to vacate under § 10(a)(4), the court does not consider whether the arbitrator correctly decided the issue. See Banco de Seguros del Estado, 344 F.3d at 262. "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." United Paperworkers Int'l Union AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987); see AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1752 (2011) ("[R]eview under § 10 focuses on misconduct rather than mistake."); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S.Ct. 1758, 1767 (2010) ("It is not enough for petitioners to show that the panel committed an error - or even a serious error.") (citing Eastern Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000)). The court will uphold an arbitral award if the arbitrator offers even a "barely colorable justification" for the outcome reached. Reliastar, 564 F.3d at 86.

2. **"Manifest Disregard" of the Law**

In addition to the express statutory grounds found in § 10(a) of the FAA, there is an implied basis for vacatur where an arbitrator's award is in "manifest disregard" of the applicable law. The manifest disregard standard originated in the Supreme Court's decision in Wilko v. Swan, 346 U.S. 427, 436-37 (153) ("[T]he interpretations of the law by the arbitrators in

contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.").

Although the Supreme Court has since cast doubt on the ongoing viability of the manifest disregard standard, see Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 584-91 (2008) (suggesting that "manifest disregard" may have been meant to refer to the § 10 grounds for vacatur collectively, rather than add to them, or may have been shorthand for the provisions of § 10 authorizing vacatur when arbitrators are "guilty of misconduct" or "exceeded their powers"), the Second Circuit continues to recognize manifest disregard as a distinct basis for vacatur of arbitral awards. See T.Co Metals, 592 F.3d at 340 (concluding that manifest disregard "'remains a valid ground for vacating arbitration awards'" (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94-95 (2d Cir. 2003))).

Nevertheless, the party alleging an arbitrator's manifest disregard of the law "bears a heavy burden." T.Co Metals, 592 F.3d at 339 (internal citation omitted). Arbitral awards are vacated on the basis of manifest disregard only in "those exceedingly rare instances where some egregious impropriety on the part of the arbitrator[] is apparent." Stolt-Nielsen S.A., 548 F.3d at 91 (quoting Dufuerco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003)).

To determine whether such impropriety is apparent, the Second Circuit engages in a two-pronged analysis. First, the reviewing court must find that the arbitrator ignored clearly defined law that was "in fact explicitly applicable to the matter before" him. T.Co Metals, 592 F.3d at 339 (internal citation omitted). "[M]isapplication of an ambiguous law does not constitute manifest disregard." Id. Second, the court must find that the applicable law was in fact ignored or improperly applied, leading to an erroneous outcome. "Even where explanation for an award is deficient or non-existent, [the court] will confirm it if a justifiable ground for the decision can be inferred from the facts of the case." Id.

3. **Arbitral Decisions Against Public Policy**

Finally, a party may seek to vacate an arbitral award because it is contrary to public policy. See Misco, 484 U.S. at 43 ("'[A] court may not enforce a collective-bargaining agreement that is contrary to public policy.'") (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983)). The public policy exception is "extremely limited," however, and the party moving to vacate must establish its existence. See Local 97, Int'l Bd. of Elec. Workers, A.F.L.-C.I.O. v. Niagara Mohawk Power Corp., 196 F.3d 117, 125 (2d Cir. 1999). A reviewing court's authority to vacate on public policy grounds is restricted to "situations where the contract as interpreted

would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." Misco, 484 U.S. at 43 (internal citation omitted). Furthermore, a court may vacate only if "it can demonstrate that the policy is one that specifically militates against the relief ordered by the arbitrator." Niagara Mohawk, 196 F.3d at 125; see id. ("[T]he court must determine whether the award itself, as contrasted with the reasoning that underlies the award, 'create[s] [an] explicit conflict with other laws and legal precedents' and thus clearly violates an identifiable public policy.") (internal citation omitted).

II. Petitioner's Motion to Vacate

Petitioner raises several arguments in support of his motion to vacate the arbitral award. First, he contends that the arbitrator's denial of his minimum wage claim was in manifest disregard of the law and contrary to public policy. Second, he contends that the arbitrator exceeded his power by denying his claim to unpaid post-termination commissions, and that the denial of that claim was in manifest disregard of the law and contrary to public policy. Finally, he contends that the arbitrator exceeded his power and manifestly disregarded the law when he failed to award attorneys' fees and costs in connection

with the award of $1,331.00 in unpaid pre-termination commissions. We address each of petitioner's arguments in turn.

1. The Arbitrator's Denial of Petitioner's Minimum Wage Claim

Petitioner argues that the arbitrator denied his claim to minimum wages in manifest disregard of the law because he performed eighty hours of work "without compensation" between September 15, 2009 and September 29, 2009, in violation of the FLSA and NYLL § 652. (Mem. in Supp. of Pet. at 7.) He further contends that the arbitrator's denial of that claim violated the public policy underlying the minimum wage provisions. (Id. at 10.) For the following reasons, these arguments are without merit.

Petitioner's August 1, 2009 compensation agreement designated him a commission-based sales executive, whose compensation was limited to 25% of all collected revenues on Ambassador's national accounts. (Ex. F to Mem. of Law in Supp. of Pet. at 14.) Finding that the agreement entitled petitioner to exclusively commission-based compensation, the arbitrator concluded that petitioner was not owed any hourly wages in addition to his earned commissions. (Id.)

Under New York contract law, employers and employees may contractually agree to the terms and conditions of an employee's compensation. See Pachter v. Bernard Hodes Group, Inc., 10

N.Y.3d 609, 618 (N.Y. 2008) (finding that employees are free to enter into employment arrangements by contract and may "add whatever conditions they may wish to their agreement") (quoting Feinberg Bros. Agency v. Berted Realty Co., 70 N.Y.2d 828, 830 (N.Y. 1987)). It is plain on the face of petitioner's compensation agreement that he was not entitled to hourly wages in addition to his earned commissions, a fact petitioner concedes in his Memorandum of Law in Support of the Motion to Vacate. (See Mem. of Law in Supp. of Pet. at 16 ("Claimant was under an exclusively commission-based contract effective August 1, 2009, which entitled him to '25% of collected revenues' and 'collected amounts.'")) Thus, in concluding that petitioner was entitled to only his earned commissions, the arbitrator did nothing more than enforce the terms of petitioner's compensation agreement.

Moreover, petitioner in no way shows that the terms of his compensation agreement violate the minimum wage provisions of the FLSA and NYLL. Those provisions simply require every employer to pay its employees compensation at least equivalent to $7.25 an hour, regardless of whether that compensation takes the form of commission-only salary or hourly wages. See N.Y. Labor Law § 652 (2011); 29 U.S.C. § 206(a)(1)(C) (2007). The notion that the arbitrator manifestly disregarded the law by enforcing the compensation agreement, under which petitioner

received $13,045.10 in commissions during the final two months of his employment, is ridiculous. As a result, petitioner's argument that the denial of his minimum wage claim violates public policy must fail as well, because it proceeds on the false assumption that the award violates the minimum wage provisions in the first place.

2. The Arbitrator's Denial of Petitioner's Post-Termination Commissions Claim

Petitioner next argues that the arbitrator exceeded his powers and manifestly disregarded the law by denying his claim to unpaid post-termination commissions, or commissions on accounts for which Ambassador collected customer payment after his resignation. (Mem. of Law in Supp. of Pet. at 12.) Specifically, petitioner claims the arbitrator wrongly concluded that he failed to prove entitlement to post-termination commissions, in violation of Ambassador's Sales Guidelines and thus in manifest disregard of NYLL § 191. (Id. at 13-16.) For the reasons set forth below, these arguments are unavailing.

Petitioner's argument that the arbitrator exceeded his powers fails to meet the high standard established for vacatur on that ground. When deciding whether an arbitrator exceeded the scope of his powers, the reviewing court need only determine that the arbitrator had proper authority to decide the issue. See Banco de Seguros del Estado, 344 F.3d at 262. Petitioner

mischaracterizes this standard by arguing that the arbitrator went "beyond the [Sales Agreement's] terms" when he declined to award him post-termination commissions. (Mem. of Law in Supp. of Pet. at 14.) In fact, the § 10(a)(4) inquiry looks only to whether the arbitrator derived his award from the essence of the agreement to arbitrate, not the provision of the agreement in dispute at arbitration. See ReliaStar, 564 F.3d at 85. Because petitioner's claim to post-termination commissions plainly falls within the scope of the Sales Agreement's arbitration clause, which provides that "[a]ny disputes concerning or relating to the commissions of any salesperson shall be resolved via arbitration," there can be no question that the arbitrator properly considered petitioner's claim to post-termination commissions within the scope of his authority. (Ex. C to Mem. of Law in Supp. of Pet. at 10.)

Petitioner's argument that the arbitrator manifestly disregarded NYLL § 191 by concluding that he was not entitled to post-termination commissions must fail as well. (See Mem. of Law in Supp. of Pet. at 15.) Section 191 provides that a commission-based salesperson is entitled to his earned commissions, as defined under the terms of his employment agreement. See N.Y. Labor Law § 191(c) ("A commission salesperson shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of

employment."); see also id. § 191-a(b) ("'Earned commission' means a commission due for services or merchandise which is due according to the terms of an applicable contract."). Petitioner's August 1, 2009 compensation agreement entitled him only to commissions on "collected" revenues. (Ex. F to Mem. of Law in Supp. of Pet. at 14.) Relying expressly on § 191, the arbitrator interpreted that language to exclude commissions on revenues collected post-termination from the definition of earned commissions. (See Ex. F to Mem. of Law in Supp. of Pet. at 12-13 ("[The compensation agreement] gave [petitioner] a right to 25% commissions on 'collected revenues' or 'collected amounts.' By definition, this excludes from the concept of earned commissions within the meaning of Labor Law § 191(c) the commissions that have not been funded.").) As a result, the arbitrator neither ignored, nor erroneously refused to apply, applicable law to his interpretation of petitioner's compensation agreement.

Moreover, the arbitrator's interpretation of petitioner's compensation agreement is consistent with the established premise of New York labor law that parties may contractually agree to a definition of earned commissions. See Pachter, 10 N.Y.3d at 612 ("[T]he determination of when a commission is earned is governed by the parties' express or implied agreement."); see also Simas v. Merrill Corp., No. 02 Civ. 4400

(RCC), 2004 WL 213013, at *3-4 (S.D.N.Y. Feb. 4, 2004) (denying plaintiff's claim to commissions other than those earned, as defined in written employment contract); Graff v. Enodis Corp., No. 02 Civ. 5922 (JSR), 2003 WL 1702026, at *1-2 (S.D.N.Y. Mar. 28, 2003) (same). Viewed in light of this precedent, the arbitrator's denial of petitioner's claim to post-termination commissions hardly qualifies as an "exceedingly rare instance[] where some egregious impropriety on the part of the arbitrator[] is apparent." Dufuerco, 333 F.3d at 389.

Given our conclusion that the arbitrator's denial of post-termination commissions is consistent with New York labor law, petitioner's argument that the award violates the public policy underlying that law must fail as well.

3. The Arbitrator's Denial of Attorneys' Fees and Costs on Petitioner's Pre-Termination Commissions Claim

Finally, petitioner argues that the arbitrator manifestly disregarded the law and exceeded his powers by denying his claim to attorneys' fees and costs in connection with the award of $1,331.00 in unpaid pre-termination commissions. (See Mem. of Law in Supp. of Pet. at 19.) These arguments cannot provide a basis for vacatur of the Final Award.

Petitioner contends that the arbitrator's denial of his claim to attorneys' fees and costs was in manifest disregard of NYLL § 198, which provides that, "[i]n any action instituted in

the courts upon a wage claim by an employee . . . in which the employee prevails, the court shall allow such employee to recover . . . all reasonable attorney's fees." N.Y. Labor Law § 198(1-a). Purely as a matter of substantive law, however, petitioner did not "prevail" at arbitration, as that term is defined under the NYLL. Though a party may prevail in a wage action when he succeeds on a portion of his claims, see, e.g., Fingerlakes Chiropractic, P.C. v. Maggio, 703 N.Y.S.2d 632, 634 (4th Dep't 2000) (awarding attorneys' fees only on successful portion of party's counterclaim seeking back wages), the case law clearly requires a prevailing party to have succeeded on a "significant issue" which achieves at least "some of the benefit the parties sought in bringing suit." Kahlil v. Original Old Homestead Restaurant, Inc., 657 F.Supp.2d 470, 474 (S.D.N.Y. 2009) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

Petitioner cannot be considered the prevailing party because he did not succeed on the significant claim for which he brought suit, namely, his primary claim for $63,929.50 in unpaid commissions. The arbitrator awarded him unpaid pre-termination commissions only to the extent of $1,331.00, an amount that respondent would have paid without arbitration, had it formed the sole basis of petitioner's grievance. (See Mem. of Law in Opp. to Pet. at 18 ("To be sure, the arbitration proceeding would not have been necessary had Hamerslough's demand for

payment at the outset of this matter been $1,331.")) Thus, we cannot conclude that petitioner "prevailed" for having been awarded an undisputed amount.

Petitioner further argues that the arbitrator's denial of his claim to attorneys' fees exceeded his powers because this Court's Memorandum and Order, dated November 4, 2010, collaterally estopped him from so denying. (Mem. of Law in Supp. of Pet. at 22.) In particular, petitioner relies on a portion of our opinion that he interprets to compel an award of attorneys' fees. See Hamerslough v. Hipple, 2010 WL 4537020 (S.D.N.Y. November 4, 2010), at *3 ("[T]he arbitrator shall disregard the provision of the arbitration clause forbidding an award of fees and shall apply any applicable laws in making any such determination in the future.").

Petitioner's argument relies on a misreading of our earlier opinion in this case. The prevailing party's entitlement to attorneys' fees under the NYLL was never disputed, as respondent conceded that she would have no objection to an award of fees if petitioner were to prevail at arbitration. See id. at *3 ("Furthermore, [respondent] ha[s] no objection to the arbitrator granting attorney's fees and other expenses provided for by the NYLL should [petitioner] prevail in arbitration; in fact, [respondent] suggest[s] that the Court order such a result."). Contrary to petitioner's assertions, the language he cites

stands solely for the proposition that there could be a case in which the denial of a prevailing party's attorneys' fees would raise issues with respect to the validity of the arbitration clause in Ambassador's Sales Agreement. This is not such a case, however, because it is clear from our analysis above that petitioner was not the prevailing party.

II. Respondent's Cross-Motion to Confirm

Since we deny the petition to vacate the arbitral award, respondent's cross-petition to confirm the award is granted. See N.Y. C.P.L.R. § 7511(e) ("[U]pon the denial of a motion to vacate or modify, [a court] shall confirm the award."); see also Hall St. Assocs., 552 U.S. at 587 ("On application for an order confirming the arbitration award, the court 'must grant' the order 'unless the award is vacated, modified, or corrected as prescribed [by the FAA]'. . . . There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies.") (quoting 9 U.S.C. § 9).

CONCLUSION

For the aforementioned reasons, the petition to vacate the arbitral award is denied. Respondent's cross-petition to confirm the award is granted. The Clerk of the Court is hereby directed to enter judgment.

SO ORDERED.

DATED: New York, New York
October 24, 2012

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE