UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NDV INVESTMENT COMPANY, JM PROPERTY SP Z.O.O. SP K, and JERZY MENDELKA,	:	
Petitioners,	:	14 Civ. 923 (RMB)
- against -	:	**DECISION & ORDER**
APEX CLEARING CORPORATION, APEX CLEARING CORPORATION, AS SUCCESSOR IN INTEREST AND OBLIGATION TO PENSON FINANCIAL SERVICES, INC.	:	
Respondent.	:	

I. Background

On February 13, 2014, Jerzy Mendelka, NDV Investment Company, and JM Property SP Z.O.O. SP K (collectively, "Petitioners") filed the instant Motion to Vacate Arbitration Award pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a). The motion seeks to vacate a Financial Industry Regulatory Authority ("FINRA") award, dated November 13, 2013, "which prior to a hearing, dismissed the [Petitioners'] statement of claim as against [Respondent] Apex Clearing Corporation." (Mot. to Vacate, dated Feb. 13, 2014, at 2.) Petitioners argue, among other things, that: (1) the arbitrators acted in "manifest disregard of the law" because the panel of arbitrators "misapplied FINRA Rule 12504(a)(6)(B) to include the type of vicarious liability alleged by the [Petitioners] as being dismissible by means of a 'mistaken identity' defense;" and (2) "the failure of the panel of arbitrators to permit a full hearing on successor liability was misconduct." (Mot. to Vacate at 7–8, 11.)

On April 25, 2014, Respondent filed a memorandum of law in opposition to the motion to vacate and in support of its cross-motion to confirm the arbitration award. It also moved for

sanctions against Petitioners. Respondent argues, among other things, that: (1) Petitioners "erroneously contend that FINRA Rule 12504(a)(6)(B) applies only where there was a complete misidentification of a party"; (2) the Petitioners "received notice of [Respondent's] motion, the opportunity to submit legal briefs and evidence for the Panel's consideration, and a hearing with extensive oral argument"; and (3) sanctions are appropriate "because their [Petitioners'] Motion is not grounded in the facts or the law." (Resp.'s Mem. of Law in Opp'n to Mot. to Vacate and in Supp. of Cross-Mot. to Confirm ("Resp.'s Opp'n"), dated April 25, 2014, at 12–14, 20, 23.)

On May 13, 2014, Petitioners filed their reply. (Reply Mem., dated May 13, 2014.) On May 19, 2014, Respondent filed a motion for leave to file a sur-reply to address evidence "improperly attached" to Petitioners' reply brief which the Court denied. (Mot. for Leave to File Sur-Reply, dated May 19, 2014; May 19, 2014 Order.)[1]

For the reasons set forth below, Petitioners' motion to vacate the arbitration award is denied; Respondent's cross-motion to confirm the award is granted; and Respondent's motion for sanctions is denied.[2]

II. Legal Standard

"Under the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances." Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013) (quotations omitted). "A party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006). "An award should be upheld as long as there is even a 'barely colorable justification for the outcome reached.'" Bayme v. Groupargent Secs., LLC, No. 10-cv-6213,

[1] On April 29, 2014, the Court held a conference with the parties at which it was agreed that the "[m]otion is to be decided on submission." (Apr. 29, 2014 Minute Entry.)

[2] **Any issues raised by the parties not specifically addressed herein were considered and rejected on the merits.**

2011 WL 2946718, at *2 (S.D.N.Y. July 19, 2011) (quoting Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004)).

"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 in [the Federal Arbitration Act]." Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 587 (2008) (quotations omitted). Sections 10 and 11 of the Federal Arbitration Act respectively provide the FAA's exclusive grounds for expedited vacatur and modification. Id. at 584. "[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) (quotations omitted).[3]

III. Analysis

(1) FINRA Rule 12504(a)(6)(B)

Petitioners argue that it was "wholly inappropriate for the panel of arbitrators to countenance the [Respondent's] argument that this is merely a case of misidentification warranting dismissal under the extremely narrow grounds enunciated in Rule 12504." (Mot. to Vacate at 9.) Respondent counters that "[t]he Panel's decision to dismiss the claims against Apex pursuant to Rule 12504(a)(6)(B) is entirely consistent with countless other public FINRA arbitration awards." (Resp.'s Opp'n at 15.)

Under Second Circuit jurisprudence, to vacate an arbitration award based upon a manifest disregard of the law, the Court must find both that (1) "the governing law alleged to have been

[3] Some commentators have (even) questioned whether "manifest disregard" remains as a viable basis for vacating an arbitration award following the Supreme Court's decision in Hall Street. See Stephen Friedman, Arbitration Provisions: Little Darlings and Little Monsters, 79 FORDHAM L. REV. 2035, 2067 n.186 (2011) ("The [Hall Street] Court expressed doubt as to whether the 'manifest disregard of the law' (language the Court had used in an earlier opinion) could serve as a ground for vacating an award.").

ignored by the arbitrators was well defined, explicit, and clearly applicable," and (2) "the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it." Freedom Investors Corp. v. Hadath, No. 11-cv-5975, 2012 WL 383944, at *4 (S.D.N.Y. Feb. 7, 2012) (citing Jock v. Sterling Jewelers Inc., 646 F.3d 113, 121 n.1 (2d Cir. 2011)). An award "should be upheld if the court can discern any valid ground for it." Id.; see also Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Grp., LLC, 491 F. App'x 201, 203 (2d Cir. 2012) (quotations omitted).

Petitioners have failed to demonstrate that their interpretation of FINRA Rule 12504(a)(6)(B), i.e. that the Rule limits pre-hearing dismissal to cases involving "truly mistaken identity," was well defined, explicit, and clearly applicable. See STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC, 648 F.3d 68, 79 (2d Cir. 2011). FINRA Rule 12504(a)(6)(B) permits the arbitrators to dismiss prior to the conclusion of a party's case in chief when "the moving party was not associated with the account(s), security(ies), or conduct at issue." This was the basis for the arbitrators' ruling here: "Apex Clearing Corp. was not associated with the accounts, services or conduct at issue." (Order on Motion to Dismiss.) The arbitrators' application of Rule 12504(a)(6)(B) is supported by FINRA Regulatory Notice 09-07 which states that "FINRA intends this [subsection] to apply in cases involving issues of misidentification. For example, the panel could grant a motion to dismiss . . . [if] a claim names an individual or entity that was not connected to an account, security or conduct at the firm during the time of the dispute." FINRA Regulatory Notice 09-07, at 5. The evidence submitted by the parties in connection with the Respondent's motion to dismiss, including the list of brokerage accounts within Respondent's control that did not contain Petitioners' accounts, supported the arbitrators' finding. Because the arbitrators had (at least) "a barely colorable justification for the outcome

reached," vacatur on this ground is not appropriate. Rai v. Barclays Capital Inc., 739 F. Supp. 2d 364, 372 (S.D.N.Y. 2010) aff'd, 456 F. App'x 8 (2d Cir. 2011).[4]

(2) Section 10(a)(3) of the FAA

Petitioners argue that "the failure of the panel of arbitrators to permit a full hearing on successor liability was misconduct because [they] suppressed evidence that was both pertinent and material to the controversy." (Mot. to Vacate at 11.) Respondent counters that Petitioners "do not even argue that the Panel (a) refused to hear any evidence that was offered, or (b) rejected any motion or formal request for discovery." (Resp.'s Opp'n at 19.)

Under Section 10(a)(3) of the FAA, the Court "may make an order vacating the award upon the application of any party to the arbitration . . . where the arbitrators were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3). "[E]xcept where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review." Rai v. Barclays Capital Inc., 456 F. App'x 8, 9 (2d Cir. 2011) (quoting Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997)). "An arbitrator must only give each of the parties to the dispute an adequate opportunity to present its evidence and argument." Finkelstein v. UBS Global Asset Mgmt. (US) Inc., No. 11-cv-0356, 2011 WL 3586437, at *8 (S.D.N.Y. Aug. 9, 2011) (quotations omitted).

The panel of FINRA arbitrators granted Respondent's motion to dismiss pursuant to FINRA Rule 12504(a)(6)(B) based on extensive briefs and exhibits submitted by the parties and following an hour-long oral argument held on November 13, 2013. Each party was given an

[4] Because Petitioners have failed to establish that their interpretation of FINRA Rule 12504(a)(6)(B) is well defined, explicit, and clearly applicable, the Court implicitly also finds that the arbitrators did not ignore any such principle. See STMicroelectronics, N.V., 648 F.3d at 80.

adequate opportunity (which it utilized) to present its arguments and evidence. See, e.g., Farber v. Goldman Sachs Grp., Inc., No. 10-cv-873, 2011 WL 666396, at *4 (S.D.N.Y. Feb. 16, 2011) (where parties presented evidence and oral argument on motion to dismiss); AmeriCredit Fin. Servs., Inc. v. Oxford Mgmt. Servs., 627 F. Supp. 2d 85, 97 (E.D.N.Y. 2008) (where petitioner was given the opportunity fully to brief its motion and the arbitrator held oral argument on the motion to dismiss). The panel of arbitrators did not diminish the fundamental fairness of the proceeding. See Bayme, 2011 WL 2946718, at *5 (where FINRA panel held a hearing and allowed both parties to present evidence); see also Rai, 456 F. App'x at 9 (where "decision to exclude . . . testimony could have been based on a number of plausible grounds, including doubts about its relevance"); Kober v. Kelly, No. 06-cv-3341, 2006 WL 1993248, at *3 (S.D.N.Y. July 18, 2006) (where petitioners "were afforded an opportunity to be heard and to present their case to the panel").

(3) Sanctions

Respondent argues that the "Court should impose sanctions on [Petitioners] pursuant to 28 U.S.C. § 1927 because their Motion is not grounded in the facts or the law." (Resp.'s Opp'n at 23.) Petitioners respond, without further argument, that Respondent's "call for sanctions against the [Petitioners] is at best misguided." (Reply Mem. at 10.)

Under 28 U.S.C. § 1927, a Court may sanction "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. "Bad faith is the touchstone of an award under section 1927." U.S. Ship Mgmt., Inc. v. Maersk Line, Ltd., No. 04-cv-2504, 2004 WL 2823038, at *9 (S.D.N.Y. Dec. 1, 2004) (citing Keller v. Mobil Corp., 55 F.3d 94, 99 (2d Cir. 1995)).

While the Court finds that Petitioners' arguments lack merit, Petitioners have not

demonstrated bad faith. For example, the record does not demonstrate that Petitioners filed their motion to vacate for an improper purpose. Id. at *10 (where prevailing party failed to show that arguments, though unsuccessful, were made without justification rather than as a result of good faith belief in their validity); GFI Sec. LLC v. Labandeira, No. 01-cv-0793, 2002 WL 460059, at *8 (S.D.N.Y. Mar. 26, 2002) (same). Respondent's request for sanctions is, therefore, denied.

IV. Conclusion & Order

For the reasons set for above, Petitioners' motion to vacate [#1] is denied; Respondent's cross-motion to confirm [#8] is granted; and Respondent's motion for sanctions [#8] is denied. The Clerk is respectfully requested to close this case.

Dated: New York, New York
January 8, 2015

RMB

RICHARD M. BERMAN, U.S.D.J.