

**Manhattan Nail, Inc. v Kiss Prods, Inc.**

2003 NY Slip Op 30208(U)

January 16, 2003

Supreme Court, New York County

Docket Number: 602278102

Judge: Bruce Allen

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. Bruce Allen,  
Justice

PART 50B

MANHATTAN NAIL, INC.,

- v -

KISS PRODUCTS, INC.

INDEX NO. 602278102

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to confirm an arbitration award.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ...  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Papers Numbered	
1	_____
2A	2B 2C 2D 2E
3	3A

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

**ORDERED** that, for the reasons set out in the accompanying memorandum, the cross-motion to vacate the award of June 17, 2002 is denied; and it is further

**ORDERED** that the motion to confirm the award is granted.

**ORDERED** and **ADJUDGED** that the petitioner, Manhattan Nail, Inc, shall have judgment and recover against respondent, Kiss Products, Inc., in the amount of \$5,000,000.00 , plus interest at 6% (the rate specified in the award) from June 1, 2000 as computed by the Clerk in the amount of \$ \_\_\_\_\_ ; together with costs of this motion in the amount of \$ \_\_\_\_\_ , as taxed by the Clerk; for a total of \$ \_\_\_\_\_ , and that petitioner shall have execution therefor.

This constitutes the decision, order and judgment of this court.

Dated 1/16/03 ENTER: Bruce Allen, J.S.C.  
Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50B**

-----X

In the Matter of the  
Arbitration of Certain Controversies between  
MANHATTAN NAIL, INC.  
Petitioner,

-against-

Index No. 602278102

**KISS PRODUCTS, INC.,**  
Respondent.

-----X

For the Petitioner: Thomas V. Incantalupo  
For the Respondent: James R. Williams  
JUSTICE BRUCE ALLEN:

Petitioner has moved to confirm an arbitration award. Respondent has cross-moved to vacate the award.

Respondent is a manufacturer and distributor of cosmetics. Petitioner was a sales representative for respondent. In March, 2000, the parties executed an agreement, dated March 1, 1999, which contained a broad arbitration clause. Petitioner served upon respondent a demand for arbitration dated May 31, 2000. The demand claimed damages of \$8,548,653.46 for unpaid commissions from 1997 to 2000. The parties proceeded to arbitration.

As an initial issue, respondent contended that commissions from prior to March, 1999 were outside the scope of the arbitration agreement. After hearing argument on this issue, the **arbitration panel issued a preliminary ruling that the scope of the arbitration would include 1997** through the termination of the agreement. Respondent noted its continued objection to consideration of claims arising prior to March 1, 1999. Respondent stated that while it would continue to participate in the arbitration, it reserved the right to challenge any such claims as beyond the jurisdiction of the panel.

In June, 2002, the panel issued an award of \$5,000,000, with interest at 6% from June 1, 2000. The panel reiterated its holding that the arbitration clause covered the pre-March 1, 1999 claims. The award noted that \$2,600,000 of the \$5,000,000 total was for claims arising after March 1, 1999.

Neither party ordered a transcript of the arbitration proceeding. I agree with respondent's contention that its failure to provide a transcript does not preclude it from challenging the award. However, it does not reduce respondent's considerable burden in doing so. Respondent challenges the award on three grounds. While each ground has a specific legal test, as a general matter respondent cannot prevail on any unless it can establish that the respective ruling by the arbitrators lacked a rational basis. That is a showing that must be made based on all the evidence and arguments that were before the panel. In this proceeding, respondent **has for the most part** simply reiterated the arguments which it made at the arbitration and cited some of the evidence which it produced. That is not sufficient to meet respondent's initial burden; nor does it shift the burden to petition to recreate in specific detail the contrary evidence and arguments that were presented at the arbitration.

Respondent contends that the arbitration panel exceeded its authority by including claims arising prior to the March 1, 1999 date of the written agreement. The parties had signed a written agreement in 1992 which did not contain an arbitration clause, although by its terms that agreement covered only sales to one retailer in one state. In the intervening years, petitioner acted as respondent's sales representative with respect to many other retailers. Section **X** of the 1999 agreement provides that the parties "agree that in the event **any** controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration...". Respondent

contends that this clause cannot be read to cover disputes concerning the earlier commissions. A party cannot be forced to arbitrate subject matter which it has not agreed to arbitrate. Mionis v. Bank Julius & Baer, -AD2d- (1<sup>st</sup> Dept 2002).

As noted, the initial demand for arbitration included claims for pre- 1999 commissions. A party may seek a stay of arbitration with respect to matters it alleges are beyond the scope of the arbitration agreement. In such cases, the court makes the initial ruling regarding arbitrability. In making the determination, the court is not to engage in penetrating analysis, but rather merely to determine whether there is a reasonable relationship between the subject of the dispute and the subject matter of the arbitration agreement. New York City Transit Authority v. Amalgamated Transit Authority Union, 284 AD2d 466 (1<sup>st</sup> Dept 2001). Assuming such a relationship is found, the ultimate determination of the meaning of the agreement, and whether it was intended to cover the particular matter, is to be made by the arbitrators. Polv-Pak Industries, Inc. V. Collegiate Stores Corporation, 269 AD2d 130(1<sup>st</sup> Dept 2000).

Though respondent objected to consideration of the pre- 1999 claims, respondent did not seek a stay of arbitration. A party that does not seek a stay, and participates in the arbitration procedure, is not precluded from moving for vacatur on the grounds that the subject matter was beyond the scope of the arbitration agreement. However, in doing so, the party is limited to the evidence which was presented at the arbitration proceeding, rather than arguing the issue *de novo*. United Federation of Teachers v. Board of Education, 298 AD2d 60 (1<sup>st</sup> Dept 2002). Respondent has not shown that the evidence before the arbitrators was insufficient to establish, in the first instance, that there was a reasonable relationship between the issue of earlier commissions and the March, 1999 agreement. Nor has respondent shown that the evidence was insufficient to provide

a rational basis for the arbitrators' ultimate determination that such issue was in fact covered by the arbitration agreement.

The award states "... the Arbitrators reconfirm their determination that the claims for the Prior Sums are within the scope of this arbitration and the intendment of the parties. Respondent acknowledged during these proceedings that the Contract of March 1, 1999, resulted from lengthy negotiations between the parties, and was intended by the parties to formalize in writing business practices and commission calculation formulas that had been agreed to between the parties over the years after 1992, and thus it was determined that the controversy and claims in this arbitration regarding the Prior Sums are claims arising out of or relating to the Contract or the breach thereof within the meaning of the arbitration clause of the Contract.. " Respondent's papers do not meaningfully address that language or the evidence on which it was apparently based

Contrary to respondent's contention, the language of the agreement itself is consistent with the arbitrators' ruling that the controversy regarding Prior Sums related to the Contract or the breach thereof. Section VI of the agreement, captioned "Termination", states that nonpayment of commissions shall be cause for termination, and contains provisions regarding the payment following termination of commissions which accrued prior to termination. There **is** no language in the section limiting its provisions to commissions accrued subsequent to the date of the agreement and, given the ongoing relationship of the parties, no reason to infer such a limitation. It is noted that the correspondence between the parties regarding allegedly overdue commissions, shown in respondent's exhibits, does not refer to any distinction between pre-agreement and post-agreement commissions.

Respondent next argues that the award should be vacated as being in violation of public policy to the extent that it awarded petitioner commissions for sales during the period from the fall of 1999 through April 20, 2000. At the arbitration proceeding, respondent submitted documentary evidence showing that in that period, petitioner was establishing a business, Uptown **Nails**, to compete with respondent's products. Respondent contends that this was a clear breach of petitioner's fiduciary duty to respondent as exclusive sales representative. "It is well settled that one who owes a duty of fidelity and who is faithless in the performance of his or her services is generally not entitled to recover compensation, whether commissions or salary." Royal Carbo Corp. V. Flameguard. Inc., 229 AD2d 430 (2<sup>nd</sup> Dept 1996); Soam Corp. V. Trane Co., 202 AD2d 162 (1<sup>st</sup> Dept 1994).

That an award was made in violation of public policy may be grounds for vacatur. However, given that the public policy favoring arbitration is itself a strong concern, the circumstances in which it will apply are narrowly limited. Hackett v. Milbank, Tweed, Hadley & McCloy, 86 NY2d 146. It applies only in "cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator". New York City Transit Authority v. Transport Workers Union, 99 NY2d 1; Matter of Sprinzen, 46 NY2d 623. Respondent has not shown that the rule against recovery of commissions by a disloyal servant amounts to an absolute prohibition. Nor does it appear that there is any strong public interest in applying that rule in the circumstances of this case.

Additionally, to provide grounds for vacatur, the award must violate public policy on its face, without need for **further** analysis by the court. New York City Transit Authority v. Transport

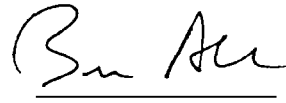
Workers Union; Hackett v. Milbank, Tweed, Hadley & McCloy. Here, there is nothing on the face of the award which compels a conclusion that the arbitrators awarded petitioner commissions for any period despite finding that it had breached a fiduciary duty. The portion of the award specified as covering post-March, 1999 commissions was \$500,000 less than petitioner had sought. Further, not all preliminary steps by a servant in setting up a rival constitute a breach of fiduciary; whether and when in the process a breach occurred would depend on the facts and circumstances of the particular case. Bon Temps Agency, Ltd v. Greenfield, 212 AD2d 427 (1<sup>st</sup> Dept 1995); Feiger v. Iral Jewelry, 41 NY2d 928. That the arbitrators may have erred in their application of the law to the facts of this case does not provide grounds for vacatur. State Nurses Association v. Nvack Hospital, 258 AD2d 303 (1<sup>st</sup> Dept 1999). On this record, it cannot be shown that the arbitrators in fact manifestly disregarded the law.

Respondent's final argument is that the arbitrators failed to take into account evidence of customer chargebacks for advertising and cooperative expenses which, under the parties' agreement, were required to be deducted from the commissions due petitioner. Respondent submitted a number of documents detailing such chargebacks. It contends that petitioner did not specifically refute most of such evidence, and that it is apparent from the amount of the award that the arbitrators did not include such deductions in their calculations. However, respondent does not dispute petitioner's allegation that petitioner challenged the general credibility of respondent's evidence in that regard, and proffered some impeachment evidence. Thus it cannot be said that the failure to credit this evidence was irrational.

**As** I find that respondent has failed to establish grounds to vacate the award pursuant to CPLR §7511, the cross-motion to vacate is denied and petitioner's motion to confirm the award

is granted.

January 16,2003

A handwritten signature in black ink, appearing to read "Ben Allen", written over a horizontal line.

**J.S.C.**