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

EMILY JANE GOODMAN

0100530/2003

PART 17

CHRISTOV, LATCHEZAR

vs AMERICDO INVESTMENT ADVISORS

INDEX NO. 100530-03

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

SCANNED

JUL 17 2003

SEQ 1

CONFIRM AWARD

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and CM SJ Motion is decided in accordance with the attached memorandum decision

TION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 7/9/03

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

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LATCHEZAR CHRISTOV,

Petitioner,

- against -

AMERINDO INVESTMENT ADVISORS INC.,

Respondent.

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Index #100530/03

Motion Seq. #001

EMILY JANE GOODMAN, J.:

Backsround

Petitioner Latchezar Christov brings this proceeding, pursuant to CPLR 7510, for an order confirming a May 14, 2002, interim award (Award) by the American Arbitration Association (AAA), and directing the entry of a money judgment. Respondent Amerindo Investment Advisors, Inc. (Amerindo) cross-moves, pursuant to CPLR 7511, for an order vacating so much of the arbitrator's award as awarded Christov fees in the sum of $44,422 plus interest, and, pursuant to CPLR 3212, for summary judgment on Amerindo's counterclaim.

Amerindo is an SEC-licensed investment adviser that specializes in managing technology and biotechnology investments for institutional and wealthy individual clients. The Award arose from a May 1990 fee agreement (May Agreement), in which Amerindo agreed to pay Christov 30% of all "management fees" and "incentive fees" that Amerindo would collect, on any account that Christov brought to it, for as long as Amerindo managed that account. Management fees are based on the value of the assets under

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management; incentive fees are based on the growth of assets under management. The Award pertains to the account of non-party John Sweetland, an account that Christov brought to Amerindo.

In August 1994, Amerindo and Christov entered into another agreement (1994 Agreement), pursuant to which Amerindo agreed to pay Christov a $75,000 fee for certain consulting services, and Christov gave Amerindo a "full and final release and settlement of any and all claims * * * against Amerindo * * * for compensation of any kind." Unlike the May Agreement, the 1994 Agreement includes a broad agreement to arbitrate before the FAA "any controversy or claim arising out of or relating to this agreement."

Discussion

The Arbitration

On August 7, 2000, Christov filed a demand for arbitration, claiming that, in violation of the May Agreement, Amerindo informed him, in May 2000, that it would no longer pay him commissions on the accounts that he had brought to Amerindo. Amerindo, thereupon, petitioned to stay arbitration, arguing that Christov's claim was based entirely on the May Agreement, and that that agreement did not provide for arbitration. By decision and judgment, dated June 20, 2001, the court (Davis, J.) dismissed Amerindo's petition. The court held that Christov's claim for compensation, under the May Agreement, was one "relating to" the release provision of the 1994 Agreement, and that the claim was, therefore, subject to the

arbitration provision of that agreement.' Judge Davis' decision, of course, constitutes the law of the case, and the issue of whether Christov's claim was arbitrable may not be relitigated here.

However, Amerindo contends that the only arbitrable issue was whether Christov's claim was within the scope of the 1994 release, and that, because the AAA arbitrator (Arbitrator) held that the release did not extinguish future rights arising under the May Agreement, he should have found himself without jurisdiction to arbitrate the merits of Christov's claim. As Justice Davis held:

> Since any claim for compensation is clearly one that is "relating to" the August 1994 agreement releasing any and all claims for compensation, the arbitration clause contained in the May 1994 agreement covers a claim for compensation under the May 1990 agreement.

Toner Aff., Exh. D, at **3**. Indeed, the viability of Christov's claim, under the May Agreement, depended upon the Arbitrator's interpretation of the release provision in the 1994 agreement, and upon his finding that the claim was not barred by that provision. The claim did not become any the less "related to" the 1994 Agreement, because of that finding. In effect, Amerindo argues that Christov's claim was arbitrable only if it was barred by the 1994 Agreement.

Amerindo's other argument for vacating the Award is that it

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[1] Amerindo filed a timely notice of appeal of Judge Davis's decision, but, for reasons best known to itself, it failed to perfect its appeal.

violates the public policy of California, in that Christov, who lives and works in California, was not licensed as an investment advisor or solicitor under any state or federal law, at the time that he solicited Mr. Sweetland to invest with Amerindo, and California law requires such licensure as a condition of acting as a solicitor.

Because the 1994 Agreement involved interstate commerce, the arbitration clause in that agreement is subject to the Federal Arbitration Act (FAA), 9 USC § 1, et seq.. Fletcher v Kidder, Peabody & Co., 81 NY2d 623, cert denied 510 US 933 (1993); St. Lawrence Explosives Corp v Worthy Bros. Pipeline Corp., 916 F Supp 187 (ND NY 1996). In addition to the grounds set forth at 9 USC § 10, upon which an FAA award may be vacated, a judicially created doctrine provides that an award made be vacated if it was made with manifest disregard of applicable well-established law. Wilko v Swan, 346 US 427 (1953); Rodriquez de Quijas v Shearson/American Express, Inc., 490 US 477 (1989). In order for an award to be vacated upon this ground, it must be shown that the arbitrator was aware of a clearly governing legal principle, but chose to ignore it; that the error was "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator * * * [and that the] governing law alleged to have been ignored * * * be well defined, explicit, and clearly applicable." Matter of Carte Blanche (Singapore) Pte., Ltd. v Carte Blanche Int., Ltd., 888 F2d 260, 265 (2d Cir 1989), quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v Bobker, 808 F2d 930, 933-934 (2d Cir

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1986). A reviewing court may not set aside an arbitral award "because of an arguable difference regarding the meaning or applicability of laws urged upon [the arbitrators]." Id. at 265.

> California Corporations Code, § 25230 (a) provides that:
>
> [i]t is unlawful for any investment adviser to conduct business as an investment adviser in this state unless the investment adviser has first applied for and secured from the commissioner a certificate, then in effect, authorizing the investment adviser to do so
>
> * * * .

California Corporations Code § 25009 defines an investment adviser as one who "engages in the business of advising others * * * as to the advisability of investing in, purchasing or selling securities." Amerindo contends that the California Commissioner of Corporations has interpreted this definition as including the activities of solicitors, who act as go-betweens between investors and registered investment advisers. However, Commissioner's Opinion No. 76/5C, 1976 Cal. Sec. Lexis 22 (the Opinion), the only basis that Amerindo offers for that contention, is a response to a query from an individual as to that individual's legal obligations, under § 25230 (a). Even assuming that such an administrative letter may sometimes constitute a well-established legal principle, the Award does not mention the Opinion, and this court cannot say that the Arbitrator concluded that the Opinion was applicable to the facts before him, but decided to ignore the Opinion, rather than either that he decided that he was not bound by an

administrative letter that is addressed to an individual (see U.S. Shirr, Mgt., Inc. v Maersk Line, Ltd., 188 F Supp 2d 358 [SD NY 20021 affd 51 Fed Appx 66, 2002 WL 31628527 [2d Cir 2002]), or that he found the facts in the Opinion distinguishable from the facts before him. Notably, the Arbitrator held that, absent a waiver from the SEC or other regulatory body, Christov's claim for commissions on a different account would fail, because, in relation to that claim, Christov was "like any other unlicensed vendor of services, who cannot recover because of a lack of licensure" Toner Aff., Exh. A, at 2. "[T]here must be some showing in the record, other than the result obtained, that the arbitrators knew the law and disregarded it, and an absence of express reasoning by the arbitrators does not support the conclusion that they disregarded the law." Fed. Proc. Lawyers Ed. § 4:126 (1999) citing O.R. Sec., Inc. v Professional Planning Assoc., Inc., 857 F2d 742 (11th Cir 1988). Here, there is nothing in the record to show that the Arbitrator knew, and disregarded, any applicable law.

Finally, Amerindo claims, as an affirmative defense to the petition, that it is entitled to a set off in the full amount demanded in the petition, by reason of certain monies mistakenly paid to Christov by Amerindo.

During the arbitration hearing, the parties stipulated to the amount of management fees that Amerindo or its affiliates had earned on the Sweetland account in the period from 1999 to 2001, and that is the amount, plus interest, that the Arbitrator awarded to Christov. However, with regard to incentive fees earned on the

Sweetland account, there was no agreed amount, and the Arbitrator directed the parties to attempt to come to an agreement, failing which, they were to return to him for a determination. By letter dated May 6, 2002, Amerindo sought to submit to the Arbitrator an unnotarized affidavit of Gary Tanaka, dated April 24, 2002. In that affidavit, Mr. Tanaka, who is a principal of Amerindo and a principal officer of non-party Amerindo Investment Advisors, a corporation organized under the laws of Panama, with offices in London (Am-Pan), avers that, among his responsibilities, he is a principal decision maker with respect to the affairs of an offshore mutual fund called the Amerindo Technology Growth Fund (ATGF), which Am-Pan manages in London. Mr. Tanaka further avers that Mr. Sweetland owned shares in ATGF; that, since at least 1990, ATGF has not charged or collected an incentive fee from its shareholders; that Am-Pan records show calculations, for several years in the 90's, of Christov's "share" of incentive fees earned on Mr. Sweetland's ATGF holdings; that those calculations "are simply a mistake by employees unfamiliar with the actual affairs of ATGF" (Toner Aff., Exh. F, at 1); and that, accordingly, Christov was overpaid for fees on Mr. Sweetland's account during the 90's. The Arbitrator expressly, but without explanation, refused to accept Mr. Tanaka's affidavit.

In an affidavit, dated April 1, 2003, which Amerindo has submitted in support of its cross motion, Mr. Tanaka adds that Am-Pan documents show that, from 1990 through 1999, Amerindo (or Am-Pan) paid Christov $114,454.22, as his share of incentive fees

on Mr. Sweetland's account, and $5,598.88, as his share of incentive fees on another account that he had brought to Amerindo. Mr. Tanaka speculates that Am-Pan employees, who were unfamiliar with the arrangements between Christov and Amerindo, had imputed incentive fees, under the mistaken belief that Christov was entitled to 30% of such fees, even if they were not charged or collected. Mr. Tanaka further speculates that the repeated mistakes of these unnamed employees likely occurred because of miscommunications between Am-Pan's New York and London offices.

The late-discovered evidence in Mr. Tanaka's affidavits is not a ground upon which the Award could be challenged. See Matter of Port Auth. of New York and New Jersey v Office of Contract Arbitrator, 254 AD2d 194 (1st Dept 1998), lv dismissed in part, denied in part 93 NY2d 913 (1999). Nor is it a ground upon which to deny the petition.

Amerindo's Counterclaim

Amerindo's cross motion for summary judgment will be denied. The sums that Amerindo seeks to recover on its counterclaim are the incentive fees that it, or Am-Pan, paid to Christov. There is no evidence before this court that Amerindo paid Christov incentive fees in the amount that it now seeks to recover. Mr. Tanaka's April 1, 2003 affidavit recites that "[f]rom time to time, Amerindo or [Am-Pan] paid to Christov fees based on their [Amerindo's and Christov's] agreement.'' Similarly, Amerindo's Verified Answer and Counterclaims recites, in the passive voice, that Christov was paid incentive fees. It does not state that Amerindo paid Christov

incentive fees, except for the sum of approximately $6,000, on an account other than that of Mr. Sweetland, but only that, "[f]rom 1990 to 1999, Christov received from Amerindo monies." Am-Pan, of course, was not a party to the arbitration, and it is not a party here. If, as the record suggests, Am-Pan paid incentive fees to Christov, Amerindo has no basis upon which to recover those payments.

Moreover, respondent's counterclaim for a set off pertains to Christov's claims for compensation, and it should have been raised at the arbitration. At present, it constitutes, in effect, an attempt to modify the Award. That Amerindo (or Am-Pan) may have belatedly discovered that, for 10 years, one or the other **of** them made payments to Christov to which Christov was not entitled does not allow Amerindo to evade the bar to modifying an arbitral award on the basis of late-discovered evidence. See Matter of Port Auth. of New York and New Jersey v Office of Contract Arbitrator, 254 AD2d 194, supra; Matter of Miqdal Plumbing & Heating Corp. (Dakar Developers, Inc.), 232 AD2d 62 (1st Dept 1997); Doherty v Barco Auto Leasing Co., 144 AD2d 424 (2d Dept 1988).

Accordingly, it is hereby

ORDERED that the petition is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is

ORDERED that respondent's motion is denied; and it is further

ORDERED that respondent's counterclaim is dismissed without prejudice to respondent seeking to present it for arbitration

before the American Arbitration Association; and it is further

ORDERED that parties settle an order within 30 days.

This constitutes the Decision and Order of the Court.

Dated: July 9, 2003

ENTER: