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

PRESENT: Richter PART 24

0100594/2005

YALOWITZ, EDWARD
vs
PRUDENTIAL EQUITY GROUP LLC

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1
CONFIRM AWARD

.. .. _____ 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

See Annexed decision + order

FILED

JUN 22 2005

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/13/05

ROSALYN RICHTER J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 24

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In the Matter of the Application of
EDWARD YALOWITZ and SHARON ZEIDLER,

Petitioners,

Index No. 100594/05

For a judgment pursuant to the Federal Arbitration Act and CPLR Article 75

-against-

PRUDENTIAL EQUITY GROUP LLC, f/k/a PRUDENTIAL SECURITIES INC., and WACHOVIA SECURITIES LLC, as successor in interest to PRUDENTIAL EQUITY GROUP, LLC, f/k/a PRUDENTIAL SECURITIES INCORPORATION,

Respondents.

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RICHTER, J. :

In this proceeding commenced on January 13, 2005 pursuant to Article 75 of the Civil Practice Law and Rules (CPLR), petitioners Edward Yalowitz (Yalowitz) and Sharon Zeidler (Zeidler), seek to vacate only that part of an arbitration award delivered to them on January 3, 2005, that found Yalowitz liable in the amount of $531,524.18 and Zeidler liable for $12,994.11 (Award) and requires petitioners to pay attorneys' fees in the amount of $119,668.02 on the basis that this portion of the Award is in "manifest disregard of the law" and irrational. Petitioners seek to confirm that portion of the Award that obligates respondent, Prudential Equity Group LLC (Prudential) to pay them $140,383.00. The respondents, Prudential, the former employer of petitioners, and Wachovia Securities LLC (Wachovia) cross-move to confirm the Award in its entirety, and to consolidate the two judgments.

When Yalowitz and Zeidler joined Prudential as financial advisors pursuant to employment agreements (Agreements) dated May 11, 2001, they were given a signing bonus described as "transitional compensation" in the amounts of $1,022,532.00 and $25,000, respectively, to be paid in installments. Petitioners were loaned the full amount in advance which loan was secured by promissory notes (collectively, the Notes). The Notes were to be repaid in installments; however, they provided that they would come immediately due upon termination of employment. On August 22, 2003, after two years of employment, petitioners tendered their resignations to Prudential. As a result, respondents sought the remainder owed on the Notes. Petitioners refused payment. The Agreements contained an arbitration clause (Agreements § 8) requiring that "any claim or controversy arising out of or relating to this Agreement, or the interpretation thereof, or your employment or termination of your employment shall be settled by arbitration."

Wachovia, the assignee of the Notes and a National Association of Securities Dealers (NASD) member, then brought a one-count arbitration proceeding before the NASD, seeking enforcement of the Notes including principal, interest, attorneys' fees, and cost of collection. Petitioners asserted affirmative defenses alleging fraud in the inducement of the Agreements, constructive discharge, and breach of the covenant of duty of good faith and fair dealing (Award, Ex A, annexed to Respondents' Verified Response to Verified Petition). Petitioners also separately asserted counterclaims identical to the three affirmative defenses seeking damages "in an amount to be determined at the hearing but not exceeding $1,000,000, plus punitive damages, interest, costs and attorneys' fees" *Ibid.*

The panel in the arbitration consisted of three experienced industry panelists, chosen by the parties, none of whom were attorneys. The hearing was conducted in five consecutive days and

resulted in 15 hearing sessions consisting of witnesses from both sides. Petitioners filed two memoranda of law with the arbitrators. PSI did not submit its own memorandum of law. The parties disputed the facts and their legal implications. The proceedings were tape recorded, but not transcribed by a court reporter.

The Award provided respondents with all of the relief sought from petitioners for the "failure to honor their obligations to repay the note(s)." (Award). Thus, respondents were awarded the outstanding principal balance and interest owed on the Notes and attorneys' fees. Petitioners, on the other hand, were awarded $140,383.00, a fraction of the $1,000,000 they sought in damages, with no interest or attorneys' fees. The arbitrators did not state the basis for this portion of the Award. The arbitrators specifically stated that "to the extent not specifically awarded or provided for above, all other claims and requests for relief by any party hereto are denied with prejudice" (Award, annexed to Verified Response to Petition as Ex A). The parties were to split the costs of the forum fees.

According to petitioners, the arbitrators manifestly disregarded the law of fraud in the inducement because they enforced petitioner's obligations under the Notes even though they found that petitioners were defrauded into entering into the Agreements and executing the Notes. Petitioners also asks the court to strike this Award as against public policy. Although the Award is silent as to the justification for the $140,383.00 awarded to petitioners on their counterclaim, petitioners deduce that it is based upon a finding of fraud based upon the fact that the arbitrators mention that certain alleged "misrepresentations" were made to petitioners while being recruited in the case summary portion of the Award. In addition, petitioners assert that if the arbitrators based their decision on the theory of constructive termination or breach of the duty of good faith, the

respondents would also be legally barred from enforcing the Notes.

Respondents oppose the petition arguing that there is no proof in the language of the Award to support petitioners' argument that there was a finding of fraud, and thus no manifest disregard of the law. Rather, respondents argue, it is evident from the Award that the arbitrators accepted respondents' view of the facts and enforced the Notes. According to respondents, a legitimate argument can be made that the award may have been based on an attempt to give petitioners an equitable setoff for some of the losses they claimed.

The Federal courts have recognized the concept of "manifest disregard" as a basis for the review of an arbitral award in actions before them to enforce or set aside an award. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2nd Cir. 1998). Where the Federal Arbitration Act (USCA Title 9) (FAA) applies, New York courts must apply the doctrine of "manifest disregard" in reviewing arbitration awards. *Morgan Stanley DW Inc. v. Afridi*, 13 A.D.3d 248 (1st Dept. 2004). The parties do not contest that the FAA governs the Agreement underlying this securities arbitration. *Ibid.* The FAA

> "embodies a strong liberal policy favoring arbitration agreements, and provides for extremely limited judicial review of an arbitration award. Thus, a court may vacate an arbitration award either on a ground set forth in § 10 (a) of the FAA or on one of several nonstatutory grounds, such as manifest disregard of the law or irrationality. The party moving to vacate an award has a high standard to meet, and even an award challenged as having manifestly disregarded that law must be confirmed as long as there is barely colorable justification for it [internal quotation marks and citation omitted]."

Uram v. Garfinkel, 16 A.D.3d 347, 348 (1st Dept. 2005). Thus, the court's function in confirming or vacating an arbitration award is severely limited "in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long, and expensive litigation."

Folkways Music Publs, Inc. v. Weiss, 989 F.2d 108, 111 (2nd Cir. 1993).

To vacate the award on the basis of manifest disregard of the law, the court must find "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law [internal quotation marks and citation omitted]." *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2nd Cir. 1997). To avoid summary confirmation of an arbitration award, the petitioner must show both that "the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and the law ignored by the arbitrators must be well defined, explicit, and clearly applicable to the case [internal quotation marks and citations omitted]." *Roffler v. Spear, Leeds & Kellogg*, 13 A.D.3d 308, 310 (1st Dept. 2004).

> "When arbitrators decline to provide an explanation for their decision, [as is the case here], a reviewing court can only infer from the facts of the case whether the arbitrators appreciated the existence of a clearly governing principle but decided to ignore or pay no attention to it. In such a case we must confirm the arbitrators' decision if a ground for the arbitrator's decision can be inferred from the case. This is so even if the ground for their decision is based on an error of fact or an error of law. Conversely, a court may infer that the arbitrators manifestly disregarded the law if it finds that the error made by the arbitrators is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator. However, determining whether to make this inference is not an easy task and a reviewing court must proceed with caution. If there is even a barely colorable justification for the outcome reached the court must confirm the award [internal quotations omitted]."

Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d at 12, "The award should be enforced even if a court is convinced that the arbitration panel made the wrong call on the law [internal quotations omitted]..."*Roffler v. Spear, Leeds & Kellogg*, 13 A.D.3d at 310.

Petitioners have failed to meet their high burden of proof in establishing that the law of fraud was "well defined, explicit and clearly applicable to the case [citations omitted]," *See*

Sawtelle v. Waddell & Reed, Inc., 304 A.D.2d 103 (1st Dept. 2003), and that the arbitrators refused to follow it. *See GMS Group, LLC v. Benderson*, 326 F.3d 75 (2nd Cir. 2003). Notably, the parties did not jointly instruct the arbitrators on the law applicable to this matter. Since the parties hotly disputed the facts and there were several theories of liability advanced, this Court cannot state that the law as stated by petitioner is controlling in this case. *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corporation*, 103 F.3d at 12. In fact, this court has no basis to determine whether the alleged "disregard" was one of fact or one of law, if either. *See Wallace v. Buttar*, 378 F.3d 182, 191-193 (2nd Cir. 2004). The fact that the arbitrators did not explain their reasoning does not require this Court to vacate the award. *See Berman v. Congregation Beth Shalom*, 171 A.D.2d 637 (2nd Dept. 1991); *J.J.K. Construction, Inc. v. Rosenberg*, 141 A.D.2d 507 (2nd Dept. 1988). Here, since at least a barely "colorable justification" for the arbitrators decision can be inferred from the respondents' presentation of the facts, the Award must be confirmed.

The other claim that the decision is "irrational" is without merit, as the arbitrators awarded respondents the remainder due on the Notes. Such a conclusion, which has some support in the record and in equity is rational.

The challenge to the attorney's fee award is denied as no showing has been made that there was manifest disregard of the law in the decision to award fees. Furthermore, the award does not specifically state that fees are being awarded for the counterclaim, and there is a factual basis in the record for the arbitrators to have given fees for litigating this proceeding.

The Court also changes and modifies the designation of Wachovia as the counter respondent in the Award to Prudential.

The petition is thus, denied. The cross-petition is granted and the judgment is consolidated and the Award is confirmed, with the caption modified to reflect that the claimant is

Wachovia Securities LLC and the counter-respondent is Prudential Equity Group LLC.

June 15, 2005

Rosalyn Richter

Justice Rosalyn Richter