

Sorrentino v Weinman

2007 NY Slip Op 34423(U)

January 8, 2007

Supreme Court, New York County

Docket Number: 107136/06

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madon
Justice

PART II

Index Number : 107136/2006

SORRENTINO, RALPH

vs

WEINMAN, MICHAEL

Sequence Number : 001

VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE 9/28/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, 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 is decided in accordance with the annexed memorandum, Decision and order

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

Dated: January 8, 2007

[Signature]
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: IAS PART 11

-----X
RALPH J. SORRENTINO,

Petitioner,

Index No. 107136/06

-against-

MICHAEL WEINMAN and UBS FINANCIAL
SERVICES, INC.,

Respondents.
-----X

MADDEN, J.:

Motion Sequence Numbers 001, 002 and 003 are herewith consolidated for disposition.

By Petition, verified May 19, 2006 (Petition), petitioner Ralph J. Sorrentino moves for an order, pursuant to CPLR 7511 (b) (1) (i) and (b) (1) (iii), vacating an arbitration award, dated February 23, 2006 (the Arbitration Award) rendered by a panel of arbitrators of the National Association of Securities Dealers (NASD) in the matter entitled Sorrentino v Weinman and UBS (NASD Case No.: 03-7225), and ordering a new hearing, on the grounds that the Arbitration Award was procured by the fraud or misconduct of respondents Michael Weinman and UBS Financial Services, Inc. (UBS) and/or the arbitrators imperfectly executed their powers such that a final and definite award on the subject matter was not made (Motion 001).

Respondents Weinman and UBS contend that the Arbitration Award was proper, and cross-move for an order, pursuant to CPLR 7510, confirming the Arbitration Award (Motion 002).

Respondents additionally move for an order striking Sorrentino's Affidavit, dated July 21, 2006, and awarding sanctions to respondents, pursuant to NYCRR Part 130-1.1 (Motion

003).

For the reasons set forth herein, the Arbitration Award is confirmed.

BACKGROUND

In October 2000, Sorrentino settled a lawsuit with his former employer BKN, Inc. (BKN), entitled Sorrentino v Bohbot Entertainment and Media, Inc., et al, Index No. 118023/97 (Supreme Court, NY County, Gammerman, J.), after a judgment was rendered in his favor.¹ Pursuant to the settlement, Sorrentino received 164,012 shares of BKN common stock, which was trading on the Neuer stock exchange in Frankfurt, Germany. As part of the settlement, the parties entered into an Account Control Agreement, which contained a prohibition, with certain limited exceptions, of any sale, assignment or transfer of the stock by Sorrentino until after October 1, 2001.

Weinman, employed by UBS, was Sorrentino's stockbroker. In January 2001, Sorrentino requested Weinman's assistance in locating a purchaser for a private sale of his BKN stock. Suffice it to say, and without reciting the parties' contentions with respect to the alleged facts, Sorrentino claimed that respondents made various misrepresentations with respect to finding a buyer, and also failed to follow Sorrentino's instructions, causing damage to Sorrentino when he ultimately sold the BKN stock at a lower price than the price he allegedly could have obtained if respondents had followed his instructions.

Pursuant to the account application that Sorrentino signed with UBS, he agreed to submit any claims that arise in accordance with the terms of the Master Account Agreement to arbitration. On June 10, 2003, Sorrentino filed a Statement of Claim and Request for Arbitration

¹ The facts underlying that action are set forth at 265 AD2d 245 (1st Dept 1999).

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with the NASD claiming, among other things, that respondents committed misrepresentation, breach of fiduciary duty, breach of contract, negligence and failure to execute, all relating to the sale of the BKN stock. Sorrentino sought compensatory damages of approximately, \$1.5 million, interest of approximately \$2.5 million, and punitive damages of approximately \$500,000 as well as attorneys' fees and expenses.

The hearings were held on three consecutive days in February 2006, and were attended by a panel comprised of three arbitrators (Robert L. Nisely, John J. McCaffery, and Richard Berenger). In the Arbitration Award, dated February 23, 2006, signed by all three arbitrators, the panel decided against Sorrentino: (a) dismissing all of Sorrentino's claims in their entirety and with prejudice; and (b) denying any and all relief requested by Sorrentino.

Sorrentino thereafter commenced this special proceeding. In the Petition, Sorrentino asserts that the Arbitration Award should be vacated and that a new hearing before a new arbitration panel should be ordered, pursuant to CPLR 7511 (b) (1) (i) and (b) (1) (iii), respectively, on the grounds that: (a) respondents committed fraud and misconduct in procuring the Arbitration Award; and (b) the panel so imperfectly executed their power that a final and definite award on the subject matter was not made.

DISCUSSION

A court may vacate an arbitration award only upon very limited grounds. As explained by the First Department:

“Judicial authority to vacate an arbitration award is limited. Unless the arbitration agreement provides otherwise, an arbitrator is not bound by principles of substantive law or by rules of evidence but "may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be" and his award will not be vacated "unless it is violative of a strong public policy, or is

totally irrational, or exceeds a specifically enumerated limitation on his power" (Matter of Silverman [Benmor Coats], 61 NY2d 299, 308). A court is bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies, and "cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one" (Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York, 94 NY2d 321, 326). Even where an arbitrator makes errors of law or fact, a court may not undertake to conform the award "to [its] sense of justice" (id.). An arbitrator's award will be confirmed "if any plausible basis exists for the award" (Graniteville Co. v First Natl. Trading Co., 179 AD2d 467, 469, lv denied 79 NY2d 759, citing Matter of Silverman, supra)."

(Azrielant v Azrielant, 301 AD2d 269, 275 [1st Dept 2002]; see also Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 471, 479-480 [2006]; Matter of Campbell v New York City Transit Auth., 32 AD3d 350, 351-352 [1st Dept 2006]; Matter of Solow Building Co., LLC v Morgan Guaranty Trust Co. of New York, 6 AD3d 356 [1st Dept 2004]).

Under CPLR 7511 (b) ("vacating or modifying award;" "grounds for vacating"), one seeking to vacate an arbitration award must show that it has been prejudiced by corruption, fraud, misconduct, partiality or an abuse of power by the arbitrator. CPLR 7511 (b), provides in relevant part that:

1. The award shall be vacated on the application of a party who either participated in arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud, or misconduct in procuring the award; or

* * *

(iii) an arbitrator . . . making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. . .

The burden is upon Sorrentino to demonstrate that any of the cognizable grounds enumerated in CPLR 7511 (b) exist (see Matter of Haynes v New York City Dept. of Homeless

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Servs., 27 AD3d 330 [1st Dept 2006]; see also Vick v Albert, 34 AD3d 331 [1st Dept 2006]). As stated in the Vick case:

“It was defendants-appellants’ burden on their cross motion to demonstrate the existence of a statutorily enumerated ground warranting vacatur of the challenged arbitration award (see CPLR 7511), and the lack of a record permitting meaningful review alone is fatal to their attempt to carry that burden (see Commonwealth Assocs. v Letsos, 40 FSupp2d 170 [SD NY1999]; and Matter of Military Contrs, Inc. [Marrano/Marc Equity Corp.], 2 AD3d 1382 [2003]). In any event, the award was properly confirmed since, so far as can be ascertained from the existing record, any alleged errors by the arbitrator do not constitute grounds for vacatur (see Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 471 [2006]). The record shows that defendants had a full and fair opportunity to present their evidence and to be heard on all of the issues.”

(Id.).

Sorrentino asserts that respondents committed misconduct and/or fraud by intentionally concealing information demanded by Sorrentino in the arbitration proceeding. He claims that respondents hid information pertaining to the identity of a potential witness “Aton” which prevented Sorrentino from calling Aton as a witness at the arbitration. Sorrentino further submits that respondents failed to produce certain “Cube” notes (i.e., internal electronic UBS notes), telephone records, and sales tickets, and that Weinman made false statements at the arbitration hearing.

Relying on cases, such as Bevona v Supervised Cleaning & Maintenance, Co. (160 AD2d 605 [1st Dept 1990]) and Kalgren v Central Mutual Ins. Co. (68 AD2d 549, 553 [1st Dept 1979]), Sorrentino claims that vacatur is proper when evidence concealed by misconduct or fraud probably would have produced a different result in the arbitration. He contends that he has met his burden and made a clear and convincing showing of respondents’ misconduct or fraud.

Evidence discovered subsequent to an arbitration hearing, which goes to the heart

of the issue at arbitration, may justify the vacatur of an arbitration award (see Matter of Science Development Corp. v Schonberger, 156 AD2d 253 [1st Dept 1989]; see also Bevona v Supervised Cleaning & Maintenance Co., *supra*). As explained by the First Department:

Although discovery of new evidence is generally not a ground for vacatur of an arbitration award (Matter of Central Gen. Hosp. v Hanover Ins. Co., 49 NY2d 950; Levine v Klein, 70 AD2d 532), it was proper, under these circumstances, for the motion court to grant respondent's motion and vacate the award pursuant to CPLR 7511 (b) (1) (i), which cites the grounds of "corruption, fraud or misconduct in procuring the award". (Matter of Science Dev. Corp. [Schonberger], 156 AD2d 253; Matter of Kalgren [Central Mut. Ins. Co.], 68 AD2d 549.) As noted by the motion court, the evidence, if credited, "would probably have produced a different result at the arbitration hearing as to the net damages due."

(*Id.*, 160 AD2d at 606).

Upon review of the record here, however, there is no indication that the witness, if produced, or the evidence, if credited, would have produced a different result. Moreover, Sorrentino made these same arguments concerning the same alleged missing information and witness at the arbitration hearing. The arbitrators rejected these arguments in rendering the Arbitration Award against Sorrentino. As such, notwithstanding his attempt to phrase the application as one based on misconduct or fraud, it would appear that, in reality, Sorrentino is impermissibly seeking judicial review of the arbitrators' analysis of the law and/or facts (see Wien & Malkin LLP v Helmsley-Spear, Inc., *supra*). Thus, the court holds that Sorrentino has failed to establish this ground as a basis to vacate the Arbitration Award.

Equally unavailing is Sorrentino's claim that the arbitration panel imperfectly executed its power, under CPLR 7511 (b) (1) (iii). In support, Sorrentino somehow reasons that, since the panel denied respondents' motion for a ruling in their favor during the course of the

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arbitration hearing, and also denied Weinman's motion to have the record expunged, the arbitrators made a substantive finding in Sorrentino's favor that was contradictory to the dismissal of his case in the Arbitration Award. Sorrentino, however, presents no support for these suppositions, and the court is unable to discern any.

Sorrentino had a full and fair opportunity to present his case during the arbitration proceeding. He has not demonstrated misconduct or fraud, or imperfect execution of the Arbitration Award, as grounds for vacatur under CPLR 7511(b). While he obviously disagreed with the Arbitration Award, this is not a basis for refusing to confirm it (Azrielant v Azrielant, supra).

Accordingly, Sorrentino's motion to vacate the Arbitration Award is denied, and respondents' motion to confirm is granted.

Respondents additionally seek an order striking the July 21, 2006 Affidavit submitted by Sorrentino, and an order, pursuant to NYCRR Part 130-1.1 imposing sanctions against Sorrentino and his counsel. Respondents contend that the Sorrentino Affidavit contains certain false statements concerning the outcome of the NASD's investigation of Sorrentino's complaints of misconduct by respondents.

A court, in its discretion, may impose financial sanctions upon any party or attorney who engages in frivolous conduct in a civil action. (22 NYCRR 130-1.1). Conduct is frivolous if it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law or if it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another or if materially false factual statements are asserted (22 NYCRR 130-1.1 [c]). The fact

that Sorrentino's application to vacate the Arbitration Award is denied does not necessarily mean that it was frivolous (see e.g. Northern Adirondack Cent. School Dist. v L.H. La Plante Co., Inc., 229 AD2d 764, 766 [3d Dept 1996]; Cruz v Amsterdam Housing Authority, 174 Misc 2d 189 [Sup Ct, Albany County 1997]). Nor have respondents shown that the statements in the Sorrentino Affidavit were false, or, even if they were false, that said misstatements were material and/or that Sorrentino (or his counsel) was aware of the alleged falsity thereof. As such, respondents have not shown that the Sorrentino Affidavit contained the sort of materially false factual statement considered sanctionable under 22 NYCRR 130-1.1 (c) (3) (see generally Rogovin v Rogovin, 27 AD3d 233 [1st Dept 2006]). Nor have they demonstrated that Sorrentino engaged in any other sort of conduct that calls for the imposition of sanctions, or that any basis exists to strike his affidavit. Accordingly, the motion to strike and for sanctions is denied.

CONCLUSION

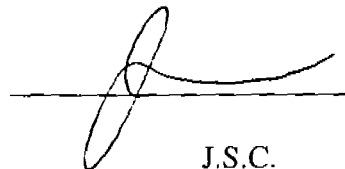
It is ORDERED and ADJUDGED that the petition to vacate the Arbitration Award is denied, and the proceeding is dismissed (motion 001); and it is further

ORDERED that the cross motion by respondents to confirm the Arbitration Award is granted and the Award is confirmed (motion 002); and it is further

ORDERED that the motion by respondents for sanctions and to strike the affidavit of Ralph J. Sorrentino is denied (motion 003).

This constitutes the order and judgment of the court.

Dated: January 8, 2007



J.S.C.

His judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).