Matter of Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.
2008 NY Slip Op 30569(U)
February 25, 2008
Supreme Court, York County
Docket Number: 0107114/2005
Judge: Joan Madden

[*1]

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

PRESENT: MADDEN Justice

PART 11

JOAN HANSEN & CO, INC

- v -

EVERLAST WORLDS BOXING HEADQUARTERS CORP

INDEX NO. 107114/05

MOTION DATE 12-10-07

MOTION SEQ. NO. 3

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion ~~to/for~~ to stay arbitration-

	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, Order + Judgment.

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 141B)

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

Dated: February 25, 2008

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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IN THE MATTER OF THE ARBITRATION OF
CERTAIN CONTROVERSIES BETWEEN

JOAN HANSEN & CO., INC.,

Petitioner,

-against- Index No. 107114/05

EVERLAST WORLD'S BOXING HEADQUARTERS CORP.,

Respondent.

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MADDEN, J:

Respondent Everlast World's Boxing Headquarters Corp. (Everlast) moves, by order to show cause, for an order permanently staying all further arbitration proceedings between it and petitioner Joan Hansen & Company, Inc. (Hansen) regarding Case No. 13 133 00438 03 of the American Arbitration Association (the AAA), and all proceedings therein. For the reasons set forth below, Everlast's motion is denied.

Everlast seeks an order staying Hansen and the AAA from taking any action regarding an October 30, 2007 application made by Hansen to the AAA, seeking a clarification of the arbitration award (the Award) issued by the arbitrators on April 14, 2005. The Award was confirmed by decision and order dated January 3, 2006, and by judgment entered March 1, 2006.

Beginning in 1983, Hansen performed services for Everlast as a non-exclusive licensing agent and consultant, pursuant to a written representation agreement (the Representation Agreement) which provided that she receive commissions for royalties based on Hansen-obtained licenses. On January 9, 2003, Everlast sent Hansen a written notice terminating

the Representation Agreement on various grounds (the Termination Notice).

On February 11, 2003, Hansen commenced the arbitration proceeding, contending, among other things, that Representation Agreement was wrongfully terminated, and that the Termination Notice was invalid. The arbitrators agreed with Hansen, and ruled that the Termination Notice was improper, and declared that the Representation Agreement was not terminated, and further directed that Everlast account for and pay to Hansen all unpaid moneys under the Representation Agreement.

At issue here is the period of time for which Hansen is entitled to receive royalty payments under the Representation Agreement in light of the Award finding that the Representation Agreement was not properly terminated. The resolution of this issue requires consideration of the provision of the Representation Agreement discussed below.

The Representation Agreement in effect at the time in issue was for a five-year term ending on December 31, 2004, unless the Agreement was terminated sooner for cause:

> The initial term of this agreement shall be from the date hereof until December 31, 1999. Thereafter, this agreement shall be automatically renewed under the terms and conditions in effect as of December 31, 1999 for five (5) years ending December 31, 2004 unless sooner terminated in accordance with the following provision:
>
> 1. At the option of either party, at any time, upon not less than thirty (30) days' prior written notice: (i) in the event of the failure of the other party hereto to fulfill its obligations hereunder in any respect ... .

Representation Agreement, Section IV (1) (i).

As of the termination of the Representation Agreement, Hansen was to receive only consultation fees "for the earlier of two (2) years after termination" or the end of the license

agreements in effect:

> 3. the participation by HANSEN in royalty payments shall continue for so long as licensees remain licensees of EVERLAST, except that: ...
>
> e. In the event of a termination of this Agreement, HANSEN shall continue to receive consultation fees on existing agreements for the earlier of two (2) years after termination or the end of the license agreements then in effect.

Id., Section VI (3) (e)[1].

Hansen was paid by Everlast all monies due to it for the period through December 31, 2006, two years from the December 31, 2004 termination date, and no further payments were made for the period subsequent to December 31, 2006. Hansen contested Everlast's cessation of payments as of December 31, 2006, claiming that the termination provision set forth in Section VI (3) (e) was only applicable in the event of an early termination of the Representation Agreement for cause, and not the expiration of its term, and that thus, Everlast remained bound to pay Hansen commissions based on royalties received from Hansen-obtained licensees "for so long as [the Hansen-obtained] licensees remained licensees" of Everlast.

Hansen then moved to hold Everlast and its Chief Financial Officer in contempt,

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[1]In the event of a termination of the Representation Agreement, Hansen's rights to continued receipt of compensation obtained by her were diminished by the following terms of the Representation Agreement:

> For the first year after termination, Hansen will receive the full amount of the consultation fee for that year; and in the second year Hansen will receive fifty (50%) of such fee for that year and thereafter payment of any fees will cease entirely.

Id., Section VI (3) (f).

for allegedly violating the March 1, 2006 judgment.

On October 19, 2007, this court issued a decision and order denying Hansen's motion for contempt. This court ruled that the issues in the arbitration proceeding did not involve the interpretation of Sections VI (3) (e) and (f), or whether Hansen would be entitled to any monies beyond December 31, 2006:

> Contrary to Hansen's arguments, however, the arbitrators did not determine that Sections VI (3) (e) and (f) are only applicable if the Representation Agreement was terminated for cause since the issue of the interpretation of Sections VI (3) (e) or (f) was not a subject of the arbitration. Rather, the primary issue before the arbitrators in this matter was whether the Termination Notice was valid (see Award, at 1). Thus, the arbitrators did not rule on the meaning of "termination" in those provisions, or what monies would be payable to Hansen once the Representation Agreement ended on December 31, 2004.

10/19/07 Decision, at 7. This court also wrote "the Order, which is based on the underlying Award, does not specify the period for which monies payable under the Agreement are due and owing," and noted that "the Order directs Everlast to pay Hansen commissions that are 'payable under the Agreement,' without any recitation that they are payable 'for as long as those licensees remain licensees'" (id. at 8). Moreover, this court determined that it could not intervene to interpret the Award to direct further payments to Hansen, stating that "[w]hen, as here, an arbitration award is not sufficiently explicit or is otherwise ambiguous, 'the Court may not impose it own interpretation of the Award'" (id. at 9 [citation omitted]).

On October 30, 2007, Hansen sent a letter to the AAA, asking that the arbitrators clarify the Award to make clear that Sections VI (3) (e) and (f) of the Representation Agreement have no application to Everlast's obligation to pay Hansen commissions based on royalties

received from Hansen-obtained licensees "for so long as those licensees remain licensees" of Everlast:

> Hansen requests that the Arbitrators clarify the Award to make plain that in holding that Respondent's Notice of Termination of the parties' Representation Agreement to be a nullity, the Arbitrators were directing Respondent to account for, and pay to Hansen all monies due Hansen on account of trademark royalties received by Respondent from Hansen-obtained licensees, for "so long as the licensees remain licensees of [Respondent]" and that Sections VI (3) (e) and (f) of the Representation Agreement have no effect on that obligation.

10/30/07 Letter, at 1 (Aff. of Edward R. Epstein, Exh D).

Everlast contends that Hansen's application must be permanently stayed since the time for Hansen to seek "modification" of the Award has expired. In support of this contention, Everlast relies on CPLR 7509, which provides that a party seeking modification of an arbitration award from the arbitrators shall make an application within 20 days of its receipt of the award, and CPLR 7511 which provides that an application to a court to modify or vacate an award shall be made within 90 days of the party's receipt of the award. Accordingly, Everlast argues that Hansen's application to the AAA is time-barred, because it was not made within the 20 or 90-day time limits set forth in those statutes. Everlast also argues that Hansen's application is improper since the manner in which Hansen was to be paid was not the subject of the prior arbitration proceedings.

In reply, Hansen points out that the word "modification" is never used in the October 30, 2007 letter to the AAA. Rather, at all places in the six-page letter, the words used are "clarify" or "clarification," and that the distinction between clarification of an arbitration award and modification of such an award is outcome determinative.

Hansen's position has merit. The power to clarify an award rests with the arbitrator, and such clarification does not violate or otherwise involve the modification provisions of CPLR article 75 (Matter of Beleggingsmaatschappij Wolfje, B.V. v AES Ecotek Europe Holdings, B.V., 21 AD3d 858 [1st Dept 2005]; accord Herskowitz v VCV Dev. Corp., 2006 WL 5112811 [Sup Ct, NY County 2006]; but see, 1199 SEIU v. St. Luke Residential Health Care Facility, Inc., 2005 WL 1828762 [ND NY 2005]; Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, 563 FSupp 1197, 1200 [SD NY 1983][both applying the time limits for modifying award to requests to have an award clarified).

Thus, in Beleggingsmaatschappij, the Appellate Division, First Department held that CPLR 7509 and 7511 were inapplicable to an application for clarification of an existing arbitration award. The arbitration panel had delivered its award on November 18, 2002. Similar to the case at bar, there was a dispute as to what the award actually required of the parties. Specifically, the parties disagreed over whether the petitioner was required to sell certain shares in the parties' joint venture to the respondent. On December 30, 2003, over a year after the award was delivered, the Supreme Court found that it did not have the power to interpret the arbitration award, and directed that "clarification" be sought from the arbitration panel. The clarification was then given, and the Supreme Court confirmed the arbitration award.

In addressing the appellant's argument that the respondent was time-barred from seeking clarification pursuant to CPLR 7509 and 7511, the First Department held:

> Contrary to petitioner's contention, the motion court did not seek or order a modification of the original final award, but rather properly directed respondent to request clarification of the original Final award to facilitate intelligent judicial review of the award (see Corning Firefighters, Local 932 AFL-CIO, IAFF v City of

> Corning, 97 AD2d 975 [4th Dept1983]). Since the original final award was not modified, there could have been no failure to comply with CPLR 7509 or 7511.

21 AD3d at 859.

Likewise, here, Hansen is not seeking a modification of the Award, but instead seeks clarification from the same panel which made the original determination. "[A]ny uncertainty about the purport of the award should be submitted to the arbitrators for clarification and not to the courts" (Aigen v Giannone, 49 AD2d 562, 562 [2d Dept 1975]; see also Hamilton Partners Ltd. v Singer, 290 AD2d 316, 316 [1st Dept 2002] ["This Court has recognized the authority of a court ... to remand the matter to an arbitration panel when the panel's award does not dispose of a particular issue raised by the parties or indicate the panel's intention with respect to it, or when the award is ambiguous and not sufficiently explicit, since a court may not impose its own interpretation of the award"] [citations omitted]).

Thus, because the Award did not explicitly specify whether the payments to be made to Hansen under the Representation Agreement were to cease at the end of the two-year limitation period of Section VI (3) (c), or whether the payments were to continue "for so long as those licensees remained licensees" of Everlast, Hansen should be permitted to seek clarification with respect to this issue from the AAA (see Matter of Beleggingsmaatschappij Wolfje, B.V. v AES Ecotek Europe Holdings, B.V., 21 AD3d 858, supra [ambiguity must be resolved by the arbitration panel which determined the award]; Corning Firefighters, Local 932, AFL-CIO, IAFF v City of Corning, 97 AD2d 975 [4th Dept 1983] [court remanded case back for clarification to the panel which determined the arbitration award]).

Although Everlast contends that the time period during which Hansen was to be

paid under the Representation Agreement was not an issue in the arbitration proceeding, and thus, the Arbitration Panel would have no authority to clarify the Award, the court rejects this argument. During the arbitration proceeding, Everlast's entire defense to the claim of breach of Representation Agreement was that Hansen was terminated for cause, which defense was based upon the identical provision of the Representation Agreement, Section VI (3) (e), which it now claims excuses it from any further commission payments to Hansen.

The court also rejects Everlast's argument that once a court has confirmed an award, the arbitrators cannot issue a clarification of the award. Everlast cites no relevant authority in support of this proposition. Moreover, the vague nature of the Award with respect to the issue of whether Hansen would be entitled to any monies beyond December 31, 2006 only became apparent after Everlast ceased making payments to Hansen, and Hansen moved for an order of contempt, well after confirmation of the Award.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is hereby

ORDERED and ADJUDGED that Everlast's motion for an order permanently staying all further arbitration proceedings between it and Hansen regarding AAA Case No. 13 133 00438 03 is denied.

Dated: February 25 2008

J.S.C.