

Matter of Inyx, Inc. v Bartke

2008 NY Slip Op 32953(U)

October 21, 2008

Supreme Court, New York County

Docket Number: 600828/2008

Judge: Charles E. Ramos

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

PRESENT: Ramos
Justice

PART 33m

Inyx, Inc.,

INDEX NO. 600 828/08

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Ulrich Bartra

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DISPOSED OF
IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM DECISION

FILED
OCT 29 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/26/08

[Signature]
HON. CHARLES E. RAMOS ^{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: COMMERCIAL DIVISION
-----X

Application of INYX, INC.,

Petitioner,

For an Order Pursuant to Article 75 of
the CPLR Vacating an Arbitration Award

-against-

ULRICH BARTKE,

Respondent.
-----X

Index No.
600828/08

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

Charles Edward Ramos, J.S.C.:

Petitioner Inyx, Inc. (Inyx) moves to vacate the arbitration award dated December 21, 2007 (the Award), in the proceeding entitled "In the Matter of the Arbitration between Ulrich Bartke v Inyx, Inc." (Arbitration).

Respondent Ulrich Bartke cross-moves to confirm the Award.

Background

Bartke was employed at Inyx in the United Kingdom as Vice President of Global Sales and Marketing, pursuant to a written employment agreement (Employment Agreement). The Employment Agreement contains a broad arbitration clause, and entitles the prevailing party to attorney's fees and expenses resulting from the arbitration proceeding (Employment Agreement, § 5.11).

In December 2005, Inyx notified Bartke that it was conducting an investigation into his employment performance, and that he would be required to attend a disciplinary hearing. After the hearing, Inyx terminated Bartke for cause, and offered him a termination package that included severance pay and stock options. Bartke rejected the termination package, and commenced

the Arbitration.

The Arbitration

Bartke asserted claims under his Employment Agreement and stock option plan, seeking damages in excess of \$2 million, and sought attorney's fees and expenses incurred in the Arbitration.

In his Witness Statement, Bartke represented that he incurred £100,000 in legal fees post-termination and that he would "provide an itemized statement at the hearing," (Exhibit 12, annexed to the Aff. of Robert Herskovits, Esq.). During cross-examination, Bartke was asked if he could "estimate what percentage of that figure [£100,000] was incurred pre-termination or post-termination" (Arbitration Transcript: 792:5-12). Bartke replied that he could not provide an estimate off the top of his head (*Id.* at 792:13-14). Bartke did not "provide an itemized statement" and no other evidence was presented at the hearing relating to attorney's fees.

However, without notice to Inyx, Bartke included a schedule (Schedule) of attorney's fees and expenses in his post-hearing brief (Exhibit 12, annexed to the Aff. of Robert Herskovits, Esq.). Inyx mistakenly argued in its post-hearing brief, which was submitted simultaneously, that Bartke had failed to present any evidence as to how much he incurred in attorney's fees post-termination (Exhibit 13, *Id.*). Because the submission of the Schedule was not made on prior notice to Inyx, it had no opportunity to object, respond or otherwise comment.

Thereafter, Inyx sent a letter to the arbitrator objecting

to Bartke's attachment of the Schedule to his post-hearing brief, because it was not introduced into evidence at the oral segment of the hearing (Exhibit 14, *Id.*), and because Inyx had no opportunity to respond to it.

After her receipt of Inyx's letter, the arbitrator sent an e-mail indicating that the post-hearing briefs had been received and that the hearing was closed (Exhibit 15, *Id.*). The day after, the arbitrator sent Inyx an e-mail stating that "On the last day of the hearing, I advised you that I would not accept any submissions after the final briefs" and that she would disregard its letter objecting to Bartke's submission of the Schedule (Exhibit 16, *Id.*). She did not indicate, however, that she would disregard the Schedule.

Thereafter, the arbitrator rendered the Award, entitling Bartke to damages of \$188,057.46, the equivalent to nine months salary, and \$354,466.70 in attorney's fees. This Court assumes that the arbitrator relied on the Schedule, because the award of attorney's fees was in excess of the sum set forth in the Witness Statement and consistent with the amount set forth in the Schedule, and in light of the undisputed fact that no other evidence was submitted on the attorney's fee issue.

Inyx then filed an application to modify the Award on the grounds of technical and/or computation errors (Exhibit 18, annexed to the Aff. of Robert Herskovits, Esq.). In opposition, Bartke argued, *inter alia*, that Inyx had ample opportunity to challenge the claim for fees but chose not to even after

submission of post-hearing briefs (Exhibit 19, annexed to the Aff. of Robert Herskovits, Esq.). This Court was unable to find in this record that Inyx had "ample opportunity" to challenge the claim for attorney's fees. The arbitrator denied Inyx's application for a modification, stating, "I have read and carefully considered Respondent's [Inyx's] Motion for Modification of the Award and Claimant's response to Motion. Respondent's motion is denied" (Exhibit 20, *Id.*).

Discussion

Inyx now moves to vacate the Award on the ground that the attorney's fees and expenses were improperly awarded under the Federal Arbitration Act (FAA) (Affirmation of Robert L. Herskovits, Esq., ¶¶ 38-56). Inyx contends that because the Schedule containing the attorney's fee request was not offered in the oral hearing and was submitted with Bartke's post-hearing brief, it was not sworn to, did not contain supporting documentation and deprived Inyx of its right to question the legitimacy of the Schedule. Further, Inyx argues, and the record confirms, that the parties were not granted permission to submit evidence or other documents along with their post-trial briefs.

Additionally, Inyx contends that Bartke is not entitled to attorney's fees and expenses because he was not a prevailing party in the Arbitration, a requisite to obtaining attorney's fees under the Employment Agreement.

Bartke argues that CPLR Article 75, rather than the FAA, applies to Inyx's motion to vacate the Award. In any event,

Bartke argues that even under the FAA, courts do not disturb arbitral awards even where the arbitrator disregarded evidence.

Judicial review of an arbitration award stemming from transactions affecting interstate commerce is governed by the FAA (*Diamond Waterproofing Sys. v 55 Liberty Owners Corp.*, 4 NY3d 247, 250-52 [2005]; *Uram v Garfinkel*, 16 AD3d 347, 347 [1st Dept 2005], *lv denied* 5 NY3d 347 [2005]).

Because the Employment Agreement affects interstate commerce, the FAA applies¹ (*Diamond Waterproofing Sys.*, 4 NY3d at 250-52). Additionally, the governing law clause, while providing that the parties' rights under the Employment Agreement are governed and construed by New York law, does not specify that the laws of a particular state, namely, New York, is applicable to the enforcement of the Agreement² (*Id.*).

Arbitration awards governed by the FAA may be vacated only upon the four grounds set forth in section 10 of the FAA, that involve fraud, corruption or other misconduct on the part of the arbitrator, in addition to the recognized non-statutory ground of "manifest disregard of law" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 478-80, *cert dismissed* 548 US 940 [2006]; see also *Hall Street Assocs. L.L.C. v Mattel, Inc.*, US, 128 S Ct 1396 [2008]). Further, because arbitration awards are given

¹ The Employment Agreement states that Bartke's responsibilities include supervising sales and marketing for Inyx and its affiliates worldwide (Employment Agreement, § 1.1).

² The governing law provision states that the Employment Agreement is to be governed by and construed in accordance with New York law (Employment Agreement, § 5.6).

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substantial deference, judicial review of arbitration awards is extremely limited (*Wien & Malkin LLP*, 6 NY3d at 478).

Inyx moves to vacate the Award on the basis of Section 10 (a) (3) of the FAA, that permits vacatur,

"where the arbitrators were guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy."

The only issue that concerns this Court is that although Bartke set forth one amount of claimed attorney's fees in his Witness Statement and a larger amount in his post-hearing submission of the Schedule, the arbitrator ruled on the basis of the Schedule without affording Inyx any opportunity to oppose or to respond.

In making evidentiary decisions, an arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments, even though she is not required to hear all the evidence proffered (*Temp Shain Corp. v Bertek, Inc.*, 120 F 3d 16, 20 [2d Cir 1997]; see generally, the AAA National Rules for the Resolution of Employment Disputes (Exhibit 4, annexed to the Aff. of Robert Herskovits, Esq.)).

This Court determines that based upon the record submitted, that the arbitrator failed to comply with Section 10 (a) (3) of the FAA in that she refused to hear evidence pertinent and material to the issue of attorney's fees after she permitted Bartke to submit post-hearing evidence, while denying Inyx the opportunity to be heard with regard to the calculation of attorney's fees or to cross-examine Bartke regarding the

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substance of the Schedule.

The AAA National Rules for the Resolution of Employment Disputes (Exhibit 4, annexed to the Aff. of Robert Herskovits, Esq.) provide at Section 30 (Evidence) that all evidence shall be taken in the presence of all of the parties, that evidence may be submitted to the arbitrator after the hearing only if the parties agree or if the arbitrator directs and in any event, that all parties shall be afforded an opportunity to examine such documents and to lodge appropriate objections, if any.

The record at the arbitration and the correspondence with the arbitrator make it clear that as to the submission of post-hearing briefs and the submission of the Schedule, no agreement was reached or direction given with regard to post-hearing evidence.

In addition, Rule 33 (Exhibit 4, annexed to the Aff. of Robert Herskovits, Esq.) provides that, "The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed." It is clear that this hearing was declared closed without any basis for the arbitrator to conclude that Inyx did not wish to be heard on the issue of attorney's fees, where Inyx attempted to vociferously object to the submission of the Schedule.

The arbitrator's failure to comply with the applicable rules of the arbitration tribunal confirm her lack of understanding of

her role and her responsibilities under the FAA and the AAA Rules. Although this Court would not set aside an award for *de minimis* infractions of AAA Rules, her disregard of the fundamental right to be heard as guaranteed by the FAA and provided for in the AAA Rules, leads this Court to conclude that vacatur is warranted, in part.

Inyx additionally moves to vacate that portion of the Award that awarded Bartke any attorney's fees and expenses, because Bartke was not the prevailing party. According to Inyx, Bartke could not have been the prevailing party at Arbitration because he was offered significantly more than the Award in his post-termination severance package. This Court rejects this argument and finds a sufficient basis for the arbitrator to conclude that Bartke was the prevailing party, thus entitling him to attorney's fees.

Notwithstanding the fact that the post-termination package offered to Bartke pre-Arbitration was higher in value, the arbitrator found that Bartke was the prevailing party at the Arbitration. The arbitrator found that "Inyx terminated Bartke in breach of the Employment Agreement," that entitled him to damages, and denied Inyx's counterclaim in its entirety (Order of Partial Summary Judgment, ¶¶ 3,5; Award, ¶¶ 2-3, 5).

Finally, Inyx's contention that the arbitrator had a predisposition against an evidentiary record because she is a vocal proponent of determining arbitration without holding an oral hearing has some merit (Affirmation of Robert L. Herskovits,

Esq., ¶ 35). An arbitrator has the discretion under the FAA to chose not to hold oral hearings on an issue and to rely on written submission only (*British Ins. Co. of Cayman v Water Street Ins. Co., Ltd.*, 93 F Supp 2d 506, 517 [SD NY 2000]). However, this arbitrator's action of refusing Inyx both an oral hearing or written opposition on the issue of attorney's fees is not sustainable, in light of the fundamental rights involved and the AAA Rules which require submissions on notice and an opportunity to respond (*compare McMahan & Co. v Dunn Newfund I, Ltd.*, 230 AD2d 1 [1st Dept], *lv denied* 90 NY2d 806 [1997]). This is the only regard in which this award is to be vacated. Inyx does not raise any facts that would warrant vacating the entire award or the various findings not affected by the arbitrator's refusal to hear opposition on the issue of attorney's fees.

Therefore, Inyx persuades this Court that it was deprived of an opportunity to be heard on the issue of attorney's fees at the arbitration. This Court has been unable to discern a basis upon which it could conclude that the arbitrator was biased, but leaves to the AAA the question of assigning a substitute arbitrator more sensitive to the rights of the parties and its own Rules, to finally hear and resolve the issue of attorney's fees.

Accordingly, it is

ORDERED that Inyx, Inc.'s motion to vacate the Award is granted, and it is further

ORDERED that Ulrich Bartke's cross-motion to confirm the

Award is denied; and it is further

ORDERED that this matter is referred back to the AAA to render a final award consistent with this Court's decision.

Dated: October 21, 2008



J.S.C.

HON. CHARLES E. RAMOS

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK