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

PRESENT: O. PETER SHERWOOD PART 61
Justice

L& R EXPLORATION VENTURE, *et al.*,

Petitioners,

-against-

JACK J. GRYNBERG,

Respondent.

INDEX NO. 101646/02

MOTION DATE Feb. 13, 2009

MOTION SEQ. NO. 005

MOTION CAL. NO. 73

The following papers, numbered 1 to 6 were read on this petition pursuant to CPLR § 7510

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, the petitioner's application pursuant to CPLR § 7510 to confirm an arbitration award is decided in accordance with the accompanying decision and judgment.

Dated: March 6, 2009

O. PETER SHERWOOD, *J.S.C.*

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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L & R EXPLORATION VENTURE, ANN L. BRONFMAN, JUDITH L. CHIARA, PETER DIXON, as Executor of the Estate of W. Palmer Dixon, MARGARET L. KEMPNER, THOMAS L. KEMPNER, JEROME A. MANNING and JOHN A. LEVIN, Trustees of the Carl M. Loeb Trust F/B/O Ann L. Bronfman, JEROME A. MANNING and JOHN A. LEVIN, Trustees of the Carl M. Loeb Trust F/B/O Judith L. Chiara, JEROME A. MANNING and JOHN A. LEVIN, Trustees of the Carl M. Loeb Trust F/B/O Deborah L. Brice, JEROME A. MANNING and JOHN A. LEVIN, Trustees under the will of Frances L. Loeb F/B/O John L. Loeb, Jr., Estate of HENRY A. LOEB, JOHN L. LOEB, Jr., TROF, Inc., formerly known as Marshall Petroleum, LARRY C. SERR, as Trustee of the Robineau Trust, JOHN S. RODGERS, COLUMBIA UNIVERSITY TRUST ADMINISTRATION, as Executor of the Estate of Daniel Silberberg, JOHN RODGERS and MAL. L. BARASCH, as Trustees of the Audrey Holly Trust, JOHN RODGERS, JOHN L. LOEB, Jr., and MAL L. BARASCH, as Trustees of the Virginia Bloomgarden Trust, M. WELLMAN, as Trustee of the Mark J. Millard Trust, FREDERICK LUBCHER and ANN B. LESK, as Trustees of the Diana von Mueffling Trust, Charles von Mueffling Trust, and William von Mueffling Trust,

Petitioners,

- against -

JACK J. GRYNBERG,

Respondent.

DECISION AND JUDGMENT

Index.: 101646/2002

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O. PETER SHERWOOD, J.:

In this proceeding brought pursuant to CPLR Article 75, petitioners have moved to confirm the award of a three member arbitration panel. Respondent, Jack J. Grynberg, has opposed the motion and has filed a cross motion to partially vacate the award.

In deciding the motion and cross motion, the court has considered the following papers: petitioner's Notice of Motion to Confirm Arbitration Award dated November 25, 2008; the Affidavit in Support of Motion of Leonard F. Lesser, Esq., sworn on November 24, 2008, the exhibits attached thereto, the 4/25/2005 Record on Appeal to the Appellate Division First

Department; the transcript of the hearing before the arbitrators; the Notice of Cross Motion dated January 9, 2009; the Affirmation of Ronald C. Minkoff, Esq., dated January 9, 2009 in Support of Grynberg's Cross-Motion to Vacate the Award and the exhibits attached thereto; Respondent's Memorandum of Law in Opposition dated January 9, 2009; and the Reply Affirmation of Leonard F. Lesser, Esq., dated February 10, 2009 and the exhibits attached thereto.

The parties are partners in a very profitable joint venture formed a half century ago to explore, locate, develop and obtain production from natural gas wells located in Wyoming. Respondent (or his wife) has a 41.5% interest in the joint venture. The dispute that was the subject of the arbitration involves respondent's accounting to petitioners with respect to (1) proceeds of litigation brought by respondent against Questar Corporation, a gas pipeline company and (2) aspects of the joint venture agreement.

Following an eight (8) day evidentiary hearing and extensive post-hearing briefing, arbitrators rendered a unanimous written award resolving all claims. Most elements of the award are not disputed. Respondent's opposition to the motion and the basis of his cross-motion concern two aspects of the award:

1. The portions of the award styled "Calculation Error (8/6/2001)" and "Calculation Error (2/7/2008)" both of which directed that litigation expenses incurred in connection with two lawsuits filed by respondent on behalf of himself, his wife and petitioner, L & R Exploration Venture ("L & R"), against Questar Corporation be deducted from the proceeds of the litigation before applying a 50-50 split of the remainder between Grynberg and L & R; and
2. Denial of Grynberg's counterclaim seeking reimbursement pursuant to paragraph 11(F) of a Joint Venture Agreement between a Grynberg entity and L & R for general and administrative costs ("Overhead Expenses") claimed in connection with management of the L & R Partnership over a 44 year period.

The parties agree that the Federal Arbitration Act ("FAA"), 9 U.S.C. §10 "which was modeled after New York's arbitration law" (*Smith Barney Harris Upham & Co., Inc. v. Luckie*, 85 NY2d 193, 205-06 [1995]), governs this dispute. Judicial review of arbitration awards in both federal and state courts is extremely limited. Their role is respectively limited to ascertaining

whether there exists one of the specific grounds for vacation of an award as provided in 9 U.S.C. §10 or CPLR §7511 (*see In re. Mastercraft Record Plating, Inc.*, 39 B.R. 654 [1984]; *Di Russa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 [2d Cir. 1997] ["arbitration awards are subject to very limited review"]; and *Ehul Diamonds Co., Ltd. v. Z Kor Diamonds, Inc.*, 50 AD3d 293 [1st Dept. 2008] [same]). Generally, under the FAA, an arbitration award will be vacated only upon finding violation of one of the four statutory bases contained in 9 U.S.C. §10(a) or, more rarely, if the court finds the panel has acted in manifest disregard of the law (*see Porzig v. Dresdner, Kleinwort, Benson, N.A.M LLC*, 497 F.3d 133 [2d Cir. 2007]).

Grynberg asserts that by ruling that he improperly calculated his contingent share of the proceeds of the litigations by taking his 50 percent share of the settlement before deducting for litigation expenses, the panel "abrogated the parties carefully...negotiated agreement" and thereby exceeded their powers (see 9 U.S.C. §10[a][4]) and acted in manifest disregard of the law. In essence, respondent seeks to challenge the arbitration panel's interpretation of the litigation agreements.

Under the FAA, a "party moving to vacate an award has a high standard to meet, and even an award challenged as having manifestly disregarded the law must be confirmed as long as there is barely colorable justification for it" (*Uram v. Garfinkel*, 16 A.D.3d 347, 348 [1st Dept. 2005]). Similarly, the courts have consistently accorded the narrowest readings to authorization to vacate arbitration awards under §10(a)(4) of the FAA. Where it is claimed that the arbitrators have exceeded their powers, the court's inquiry has focused on "whether the arbitrators had the power based on the parties' submissions or the arbitration agreement to reach a certain issue, not whether the arbitrators correctly decided the issue" (*Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F3d 355, 362 [2d Cir. 2003]). Under these standards the arbitrators cannot be said either to have exceeded their powers or to have acted in manifest disregard of the law.

The litigation letter agreements at issue provided in relevant part:

> L & R's 50 percent interest in the recovery from this action shall be subject to and subsequent to, Grynberg Petroleum withholding L & R's pro rata portion of the legal, engineering, investigation, and other costs and expenses associated with this action.

The arbitration panel interpreted the provision to mean that the 50% fee split from settlement

of the litigations should be computed "subsequent to" deduction of L & R's pro rata portion of the legal and administrative costs and expenses of the litigations. In reaching its decision, the panel observed that:

> Grynberg's arrangement with L & R Exploration Venture (also referred to as "L & R" and "the Partnership") was that he would pursue the claim against Questar on behalf of L & R in exchange for a 50% contingency fee. He agreed, on behalf of himself and his wife, "to bear all of the litigations costs." (Ex. 76). Subsequent letters from Grynberg went further and stated that L & R's 50% recovery was to be "subsequent to" Grynberg Petroleum withholding L & R's pro rata portion of the legal and administrative costs of the litigation. L & R's representative Rowe wrote that the settlement balance after legal costs was to be divided 50%-50%. Grynberg never responded in writing to that clarification and we only have his statement that he disagreed with Rowe in subsequent conversations. Grynberg's interpretation which was to award himself 50% of the recovery before considering the legal and administrative costs would obviously differ with his continued iteration of his agreement to bear all of the litigation costs as an inducement to procure L & R's agreement to his proposed 50%-50% split of the proceeds.

The above-quoted language contained in the letter agreements is readily susceptible to the interpretation given it by the arbitrators. Even if the court were to conclude that the arbitrators misconstrued the contracts, the award must be confirmed because interpretation of the provisions of a contract is within the province of the arbitrators (*see, Berahardt v. Polygraphic Co. of America*, 350 U.S. 198, 204 for. 4 [1956], ["Whether the arbitrators misconstrued a contract is not open to judicial review."] *Stolt-Nielsen SA v. Animalfeeds International Corp.*, 548 F3d 85, 92 [2d Cir. 2008]["In the context of contract interpretation, we are required to confirm arbitration awards despite serious reservations about the soundness of the arbitrator's reading of the contract."]; *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 214 [2d Cir. 2002]["Interpretation of [a] contract term [] is within the province of the arbitrator and will not be overruled simply because we disagree with that interpretation."]; and *Patton v. J.P. Morgan Chase & Co.*, Index No.: 104939/04, 2004 N.Y. Misc. LEXIS 3135 * 2 [N.Y. Sup., N.Y. Co., Aug. 23, 2004]["[S]o far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their

interpretation of the contracts is different from his."]).

As to respondent's counterclaim for reimbursement of certain costs, the panel, quoting Paragraph 11(F) of the Joint Venture Agreement, found that respondent had "the right to 'reimbursement for other properly allocated additional office overhead and all other client costs and expenses increased in connection with the conduct of the program'." The panel also found that except for a payment of $40,000 respondent paid to his accountant for certain bookkeeping services, respondent failed to prove how much of his overhead was allocable to L & R. Specifically, the panel found, and in this court respondent concedes, that Grynberg has no accounting records documenting expenses and could not testify that he had any real knowledge of what his expenses were. Respondent attempted to fill this gap in his proof by offering an estimate of the Overhead Expenses based on a mathematical formula. The arbitrators analyzed the methodology used by respondent's expert, a petroleum engineer who holds a B.S. degree, and found it "totally without merit".

The panel also noted that respondent's formula included sums as to which Grynberg did not intend to seek reimbursement, having reported them as non-reimbursed expenses on his tax returns. Findings based on the panel's assessment of facts are well within the province of the arbitrators. The awards may not be set aside on grounds of erroneous findings of fact (*see, Fitzgerald v. Fahnestock & Co.*, 48 AD2d 246, 247 [1st Dept. 2008]; *Amicizia Societa Navegazione v. Chilian Nitrate & Iodine Sales Corp.*, 247 F.2d 805 [2d Cir. 1960]; and *Bernhardt*, 350 U.S. at 198 fn. 4.).

Respondent's claim to Overhead Expenses on the theory of unjust enrichment was properly denied. Reimbursement of expenses relating to the joint venture are the subject of paragraph 11F of the Joint Venture Agreement. Because the amount claimed is covered by contract, respondent is precluded from recovering on a quasi-contract theory, including unjust enrichment (*see Cox v. NAP Constr. Co., Inc.*, 10 NY3d 592, 608 [2008]).

Accordingly the petition to confirm the arbitrators award shall be granted and the counterclaim seeking to partially vacate the award shall be denied.

The award provides for payment of interest on the amount awarded at the rate of 6% until paid. Petitioners state that the per diem rate is $503.69. Interest shall be at the rate awarded up until the time of entry of the judgment and thereafter at the statutory rate of 9% (see CPLR §§5003 and 5004).

It is hereby

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

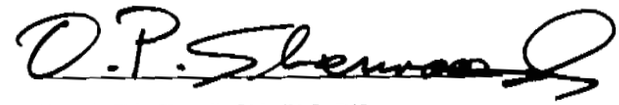
ORDERED that the counterclaim is denied; and it is further

ORDERED and ADJUDGED that the petitioners have judgment and recover against respondent, Jack J. Grynberg, in the amount of $3,505,661.34 as of November 25, 2008, plus interest at a per diem rate of $503.69 commencing November 26, 2008, until entry of judgment as computed by the Clerk in the amount of $_____ and thereafter at the statutory rate of 9%, and petitioners shall have execution thereof.

This constitutes the decision and judgment of the court.

DATED: March 6, 2009

E N T E R,



O. PETER SHERWOOD
J.S.C.