[* 1]

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

PRESENT: HON. EILEEN A. RAKOWER Justice

PART Part 5

Index Number : 601053/2009

D. WECKSTEIN & CO., INC.,

VS.

BUI, TRINITY

SEQUENCE NUMBER : # 001

CONFIRM ARBITRATION AWARD

INDEX NO. 601053-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1 - Verified Petition

2 Verified Ans. to Counter - Petition w/ Bui Affid, Boardman Aff exh's 1-23

3 - Memo of Law in Support

4 - Aff & Memo of Law in Resp to Cross Petition w/ exh's A-C

5 Reply

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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).

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 6/11/09

HON. EILEEN A. RAKOWER

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: PART 5

----------X

D. WECKSTEIN & Co., Inc.,

Petitioner,

-against-

TRINITY BUI,

Respondent.

----------X

Index No. 601053/09

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

Petitioner D. Weckstein & Co. ("Weckstein") brings this Petition pursuant to CPLR §7510 to confirm the decision rendered by a FINRA Dispute Resolution Panel ("Panel") dated March 22, 2009 ("Award"), wherein the Panel dismissed Respondent/Cross-Petitioner Trinity Bui's ("Bui") claim against Weckstein due to Bui's failure to comply with discovery orders issued by the Panel and awarded Weckstein costs, expenses and reasonable attorney's fees in the amount of $36,034.67.

Bui commenced the subject arbitration on or around January 29, 2008 by filing a Statement of Claim, alleging failure to execute by Weckstein pertaining to the sale of shares of Industrial Enterprises of American, Inc. ("IEAM") stock. Bui's claim alleged that, in the Fall of 2008, she took a stock certificate of 870,000 free trading shares of IEAM stock to Weckstein and instructed it to sell the shares immediately. Despite receiving assurances from Weckstein that the shares would be sold immediately, Weckstein failed to do so[1]. Bui subsequently took the shares to another broker who sold the shares immediately. From the time Bui took her shares to Weckstein to the time the other broker sold them, the value of the stock had dropped from approximately $2.50/share to $0.69/share, resulting in a loss of about $1,000,000.

[1] Annexed to Bui's cross-petition is an e-mail from a Ross Furman explaining that "Donnie Weckstein told me that he was very uncomfortable with this transaction because he felt there was a lot of risk being taken by his firm if he were to sell these shares and then something were to go wrong with the certificate. Donnie then decided he was not going to allow [Bui] to sell her shares until the [sic.] show up as clean shares in the Penson Financial systems which according to him could take more then [sic.] one week."

Prior to the parties' agreement to sell Bui's shares of stock, they entered into a Customer Account Agreement ("CAA") which provided, *inter alia*, that "any and all controversies, disputes, or claims" between the parties "shall be conducted pursuant to the code of arbitration procedure from the NASD."

Following an initial pre-hearing conference and the filing of discovery requests by the parties, Weckstein moved to compel production of a number of items which are presumptively discoverable under NASD Notice to Members 99-90 dated November 1999[2]. These items included Bui's tax returns, as well as numerous other items of discovery relating to Bui's business dealings. The parties argued the motion to compel in three separate telephonic conferences with the Chair of the Panel. Bui reasoned that, despite the presumptive discoverability of her tax returns, their production was unnecessary. Weckstein justified its seeking the returns by needing them to show that Bui was a sophisticated purchaser and seller of stocks. However, Bui was willing to stipulate to the fact that she was a sophisticated purchaser and seller of stocks. By order dated June 30, 2008, the Chair ruled that most of the discovery items at issue of the motion to compel - including Bui's tax returns - shall be produced by Bui over her objections. Moreover, the Chair held that Bui's tax returns would be disclosed pursuant to a confidentialty arrangement agreed upon by the parties in order to protect Bui's privacy.

A second conference was held on July 31, 2008, as Bui had failed to produce any of the discovery which was ordered in the June 30, 2008 decision (including but not limited to the tax returns). Weckstein sought dismissal of Bui's claim based upon her failure to comply with discovery ordered by the Chair. The Chair ordered Bui to produce all items previously ruled upon promptly and on a "rolling basis" as quickly as possible, but by August 21, 2008 at the very latest.

A telephone conference was held on August 21, 2008. Weckstein stated that Bui had failed to produce the majority of discovery items, the production of which was ordered by the Chair on two separate occasions. According to Weckstein in its opposition to the counter-petition (and not disputed in Bui's reply), the following items were ordered to be disclosed but were never produced by Bui, *in addition to her tax returns*:

---

[2] The Notice to Members states that the List of Documents To Be Produced In All Customer Cases (which includes the subject tax returns, "would apply in virtually all cases involving member-customer... cases unless the arbitrator, in the exercise of discretion, determines that some or all of the documents... should not be produced." The Notice to Members also provides that, where a party objects to the production of a document on confidentiality grounds, the arbitrator may order, or the parties may stipulate to, a confidentiality order.

- Bui's resume or a description of her educational and employment history;
- Net worth statements, or alternatively, an affidavit stating that a diligent search was conducted and the statements could not be located;
- Documents reflecting her ownership or control over any business entities (Weckstein also states it is undisputed that Bui was involved in at least one)
- Business, trust or partnership tax returns;
- Brokerage account statements for any account(s) owned by Bui's corporation(s) or partnership(s);
- Documents relating to any complaint or action brought by Bui or any entity owned or controller by her against any private or publicly traded entity since 2004;
- Documents relating to any complaint or action brought against Bui or any entity owned or controlled by her by any private or publicly traded entity since 2004;
- Documents reflecting Bui's calculation of alleged losses and damages.

Further, the Chair noted that, during the 8/21/08 conference, counsel for Bui "confirmed that [Bui] does not intend to produce substantial portions of those materials notwithstanding the Discovery Orders." Based upon the foregoing, the Chair set forth a briefing schedule for a motion to dismiss by Weckstein for Bui's failure to comply with discovery orders.

After reviewing the parties' submissions, the Panel issued a decision on November 13, 2008, granting Weckstein's motion and dismissing the action with prejudice. The November 13th decision also granted Weckstein leave to move for a further order directing payment from Bui to Weckstein for its costs, expenses and reasonable attorneys' fees in connection with the arbitration action.

Following the November 13th decision, Bui moved for a reopening of the arbitration action and for removal of the of the arbitrators. Weckstein opposed and moved for costs, expenses, and reasonable attorneys' fees. On March 22, 2009, the Panel denied Bui's motions for reopening and for removal of the arbitrators and granted Weckstein's motion for costs, expenses and reasonable attorneys' fees pursuant to Rule 12212 of the FINRA Code of Arbitration Procedure for Customer

Disputes ("FINRA Code").

Weckstein filed the instant Petition to confirm the Arbitration Award. Bui cross-petitioned for vacatur and/or modification of the Award pursuant to CPLR §7511 and the Federal Arbitration Act ("FAA") (9 U.S.C. §10).

Since the arbitration agreement between the parties involves a transaction which affects interstate commerce (here, the sale of over-the-counter stock in a publicly traded company), the FAA applies, and CPLR §7511, to the extent inconsistent with the FAA, is preempted. (*Morgan Stanley DW Inc. v. Afridi*, 13 A.D.3d 248); *Allen & Co. v. Shearson Loeb Rhoades, Inc.*, 111 A.D.2d 122 [1st Dept. 1985]).

9 U.S.C. §10 provides, in pertinent part

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. §11(b) provides in pertinent part that a court may modify or correct an arbitration award "where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted."

CPLR §7511 provides, in pertinent part,

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who... participated in the arbitration... 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... exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made...

(c) Grounds for modifying. The court shall modify the award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award...

Bui argues that the court must vacate, or alternatively, modify the Award on several grounds:

- The Panel applied FINRA rules to the dispute, rather than NASD rules as per the CAA;
- The Panel engaged in misconduct by ordering production of Bui's tax returns, despite her stipulating to the salient issue those returns were purportedly required to prove;
- The FINRA Code allows neither post-dismissal sanctions nor an award of costs and attorney's fees; and
- The award of attorney's fees violates 22 NYCRR §130-1.2, which only allows for sanctions of no greater than $10,000; as well as NYS public policy, which holds that a court may not award legal fees absent a statute or agreement of the parties.

> The FAA permits vacatur of an arbitration award on four grounds which all involve fraud, corruption or misconduct on the part of arbitrators.... In addition to these four grounds, an award may be vacated under federal law if it exhibits a "manifest disregard of law" (*Duferco Intl. Steel Trading v T Klaveness Shipping A/S, 333 F.3d 383, 388 [2d Cir 2003]*; *Goldman v Architectural Iron Co., 306*

> *F.3d 1214, 1216 [2d Cir 2002]* citing *DiRussa v Dean Witter Reynolds, Inc., 121 F.3d 818, 821 [2d Cir 1997]*). But manifest disregard of law is a "severely limited" doctrine (*Matter of Arbitration No. AAA13-161-0511-85 Under Grain Arbitration Rules, 867 F.2d 130, 133 [2d Cir 1989]*). It is a doctrine of last resort limited to the rare occurrences of apparent "egregious impropriety" on the part of the arbitrators, "where none of the provisions of the FAA apply" (*Duferco, 333 F.3d at 389*). The doctrine of manifest disregard, therefore, "gives extreme deference to arbitrators" (*DiRussa, 121 F.3d at 821*). The Second Circuit has also indicated that the doctrine requires "more than a simple error in law or a failure by the arbitrators to understand or apply it; and, it is more than an erroneous interpretation of the law" (*Duferco, 333 F.3d at 389*). We agree with that premise. To modify or vacate an award on the ground of manifest disregard of the law, a court must find "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case" (*Wallace v Buttar, 378 F.3d 182, 189 [2d Cir 2004]* quoting *Banco de Seguros del Estado v Mutual Mar. Off., Inc., 344 F.3d 255, 263 [2d Cir 2003]*).

(*Wien & Malkin LLP, v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471 [2006]).

Under New York law, judicial disturbance of an arbitration award on the grounds that an arbitrator exceeded his powers is appropriate "only if the award violated a strong public policy, was totally irrational, or the arbitrator in making the award clearly exceeded a limitation on [his] power specifically enumerated under CPLR 7511(b)(1)" (*Rice v. Jamaica Energy Partners, L.P.*, 13 A.D.3d 255 [1st Dept. 2004]) (*citing New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 [1999]). Moreover, "[a]n arbitrator's award, so long as it stays within the bounds of rationality, may not be vacated for errors of law or fact" (*Szabados v. Pepsi Cola Bottling Co.*, 191 A.D.2d 367 [1st Dept. 1993]).

"[B]oth federal and New York law grant arbitrators broad authority to resolve disputes through informal and expeditious means, and concomitantly limit the authority of the courts to modify or vacate arbitration awards" (*Matter of Johnson (Summit Equities, Inc.)*, 2008 NY Slip Op 28372 [Sup. Ct. NY Cty. 2008]).

The NASD and FINRA Rules at issue in the instant petitions are NASD Rule 10305; and FINRA Rules 12212 and 12511. Bui claims that the Panel's application of FINRA Rules constitutes a basis for vacatur and/or modification in that the CAA specified that disputes "shall be conducted pursuant to the code of arbitration procedure of the NASD." However, NASD Rule 10305 was superseded by Series 12000 of the FINRA Code, and remains in effect only in cases filed before April 16, 2007.

Petitioner's argument that the Panel was obligated to apply NASD Rule 10305 given the language of the CAA is without merit, as the difference between NASD and FINRA is purely semantic (*see Std. Inv. Chtd., Inc. V. NASD*, 2008 US Dist LEXIS 4617 [S.D.N.Y. 2008]) (noting that, during the pendency of the motion before the court, NASD changed its name to FINRA). In fact, in presenting her claim for arbitration, Bui was required to submit a "FINRA Arbitration Submission Agreement," Paragraph 1 of which states "The undersigned parties... hereby submit the present matter in controversy... to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure" (*see* http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p009438.pdf).

Moreover, with respect to the dismissal for failure to produce discovery as ordered on two separate occasions, the language allowing for dismissal is virtually identical, in that the outdated NASD Rule and the FINRA Rules allow for dismissal for intentional failure to comply with discovery orders where lesser sanctions have proven ineffective.

The awarding of attorneys' fees, however, is not provided for in NASD Rule 10305, while FINRA Rule 12212(a) allows for attorneys' fees. Nevertheless, Weckstein is entitled to attorneys' fees and costs for the reasons noted above. Still, it should be noted that courts have held that, even prior to FINRA's superseding of NASD Rule 10305, it was within the power of the arbitrator to award attorneys' fees based upon a broad arbitration agreement which allows for the arbitration of "all controversies," such as the arbitration agreement now before the court (*Bear*

Stearns & Co. v. Fulco, 2008 NY Slip Op 28379 [Sup. Ct. NY Cty. 2008]) (in case where arbitration commenced prior to FINRA Rules, arbitrator's awarding of attorneys' fees upheld).

The Panel had a clear basis for dismissing Bui's claim and awarding attorneys' fees based upon Bui's repeated failure to provide discovery which was ordered by the Panel. Specifically, the Panel found that the prior sanctions of assessing the full costs of the July 31st and August 21st hearings against Bui had thus far proven ineffective against Bui; and that they would continue to be ineffective in light of Bui's unequivocal statements (including in her opposition to Weckstein's motion to dismiss) that she would not produce the discovery as ordered. Ordering disclosure of Bui's tax returns pursuant to a confidentiality stipulation does not provide the court with a basis to either vacate or modify the Award because Bui has failed to show that ordering the production of the tax returns constituted a manifest disregard of the law. Moreover, the record before the court indicates that Bui failed to provide other discovery items despite being ordered twice by the Panel to do so. She has not provided any justification for her failure to produce these items, much less demonstrated that the Panel's ordering of their production constituted a basis for vacatur and/or modification under the FAA, CPLR, and/or applicable case law.

Wherefore, it is hereby

ORDERED and ADJUDGED the Petition and cross-motion are resolved to the extent that the arbitration award dated March 22, 2009 is hereby confirmed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: June 11, 2009

EILEEN A. RAKOWER, J.S.C.