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

PRESENT: COBLS Justice PART 6

XTF GLOBAL ASSET MGMT

- v -

MARCO POLO NETWORK SDNC

INDEX NO. 603465/09

MOTION DATE

MOTION SEQ. NO. 2

MOTION CAL. NO.

The following papers, numbered 1 to 13 were read on this motion to/for confirm arbitration

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits x-mot.	6-13
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 6/21/10

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
NEW YORK COUNTY: IAS PART 6

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IN THE MATTER OF THE PETITION OF
XTF GLOBAL ASSET MANAGEMENT,
LLC,

Petitioner,

Index No. 60365/09

FOR AN ORDER PURSUANT TO
SECTIONS 7502(C), 6313, AND 6201(3) OF
THE CIVIL PRACTICE LAW AND RULES
FOR A PRELIMINARY INJUNCTION, A
TEMPORARY RESTRAINING ORDER,
AND AN ORDER OF ATTACHMENT IN
AID OF ARBITRATION AGAINST

Decision, Order and Judgment

MARCO POLO NETWORK INC.,

Respondent.

----------X

JOAN B. LOBIS, J.S.C.:

In Motion Sequence Number 002, petitioner XTF Global Asset Management, LLC ("XTF") brings this order to show cause seeking an order confirming an arbitration award dated May 24, 2010 (the "Award") issued against respondent Marco Polo Network Inc. ("Marco Polo"). Marco Polo cross-moves for an order vacating the Award and granting reargument and renewal on the court's previous decision, order, and judgment dated March 1, 2010. For the following reasons, the Award is modified due to an incorrect calculation of the monetary award, but confirmed in all other respects. The cross-motion is denied in its entirety.

The parties were once joint shareholders in a company known as Marco Polo XTF Inc. (the "Company"). A Shareholder Agreement (the "Agreement") between the parties gave XTF the right to sell its entire equity share in the Company to Marco Polo in exchange for a cash payment

of $650,000. XTF exercised this right on or about June 5, 2009. Marco Polo had ninety (90) days to close the transaction, but did not. On October 23, 2009, XTF commenced an arbitration proceeding before the American Arbitration Association ("AAA"). On March 1, 2010, this court granted XTF's petition seeking an order preventing Marco Polo from transferring, selling, assigning, or encumbering any of its interest in the Company.

On or about April 21, 2010, XTF moved for summary judgment before Arbitrator Howard R. Reiss of the AAA. Marco Polo opposed. On or about May 21, 2010, Arbitrator Reiss granted XTF's motion for summary judgment, finding that a valid, fully integrated contract existed between the parties for the sale of XTF's shares. Arbitrator Reiss, in determining that Marco Polo breached this contract, ordered Marco Polo to pay to XTF $650,000, plus $23,239.44, in interest plus $3,300 in AAA fees. However, later in the award, Arbitrator Reiss ordered Marco Polo to pay the sum of $623,239.44.

Under C.P.L.R. § 7510, "[t]he court shall confirm an award upon application of a party made within one year of its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." As is relevant to respondent's contentions, the award must be vacated when "an arbitrator, or agency or person making the award exceeded his power[.]" C.P.L.R. § 7511(b)(1)(iii). "Even where the arbitrator makes a mistake of fact or law, or disregards the plain words of the parties' agreement, the award is not subject to vacatur 'unless the court concludes that it is totally irrational or violative of a strong public policy' and thus in excess of the arbitrator's powers." Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 155 (1995) (citations

omitted).

Respondent argues that the Award violates Section 160 of the Delaware General Corporation Law and Section 513 of the New York Business Corporation Law. Both laws state in sum and substance that an insolvent or soon to be insolvent company may not purchase or redeem its own shares from its stockholders. 8 Del. C. § 160; N.Y. Bus. Corp. § 513. Respondent argues that the Company is a subsidiary of Marco Polo. Thus, respondent argues, Marco Polo and the Company are the same entity, so if the Award is confirmed Marco Polo, which is on the verge of insolvency, would be purchasing its own shares. Respondent concedes that it does not have any cases to support its position. Furthermore, respondent fails to recognize that "[p]arent and subsidiary or affiliated corporations are, as a rule, treated separately and independently . . . absent a demonstration that there was an exercise of complete dominion and control [by the parent]." Sheridan Broad. Corp. v. Small, 19 A.D.3d 331, 332 (1st Dep't 2005) (citation omitted). It, thus, cannot be said that the Award violates the law.

Respondent also maintains that the Award did not correctly interpret the Agreement, because Arbitrator Reiss did not take into account other oral and written agreements between the parties. Nevertheless, "an arbitrator's interpretation of the parties' contract is impervious to judicial challenge[.]" Maross Constr., Inc. v. Central New York Reg. Transp. Auth., 66 N.Y.2d 341, 346 (1985) (citation omitted). "[A] refusal or failure to pass upon an arguably relevant issue or piece of evidence, even if mistaken, is a matter of arbitral judgment which, being part and parcel of the arbitrator's determination, is not judicially reviewable." Id. at 348 (citations omitted). Here,

Arbitrator Reiss' refusal to consider alleged oral guarantees by petitioner or other agreements between the parties that contradict the Agreement was not only within his judgment, it is in line with established contract law. See e.g., W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990) ("Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing") (citations omitted).

Regarding, respondent's motion for reargument and renewal. The court notes that respondents have failed to attach copies of the original motion papers. Regardless of this defect, that branch of the cross-motion is denied. It is well settled that leave to renew must be based upon "additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court." Foley v. Roche, 68 A.D.2d 558, 568 (1st Dep't 1979) (citations omitted); C.P.L.R. Rule 2221(e). These additional facts must be material enough to "change the prior determination." C.P.L.R. Rule 2221(e)(2). "Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application." Foley, 68 A.D.2d at 568. Inasmuch as respondent now offers an affidavit from Marco Polo's Chairman of the Board of Directors presenting new facts, respondent does not demonstrate that these facts were not known to it at the time of the motion nor does respondent demonstrate that these new facts would change this court's prior determination. A motion for reargument is "addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" William P. Pahl Equip. Corp. v. Kassis, 182 A.D.2d 22, 27 (1st Dep't 1992) (internal citations omitted); see also C.P.L.R. Rule

2221(d). Respondent has failed to demonstrate that the court overlooked or misapprehended matters of relevant fact or law with respect to the claims against it and its motion is denied.

The court notes that there is a miscalculation in the Award. At one point, petitioner is awarded $650,000, plus $23,239.44, in interest plus $3,300, in AAA fees and at another point it is awarded $623,239.44 plus the fees. Under C.P.L.R. § 7511(c)(1), the award must be modified, when, inter alia, "there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award." Here, there was an miscalculation and the Award should be for $650,000, plus $23,239.44, plus $3,300 in AAA fees. Accordingly, it is

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

ORDERED that the parties are directed to settle order on notice.

Dated: June 21, 2010

JOAN B. LOBIS, J.S.C.