SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN PART 3
Justice

Index Number : 653520/2012
ROCKWELL GLOBAL CAPITAL, LLC
vs.
ROTMAN, MARVIN
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. 653520/12
MOTION DATE 3/8/13
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3-15-13

Eileen Branston, J.S.C.
HON. EILEEN BRANSTEN

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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Application of ROCKWELL GLOBAL CAPITAL, LLC, BRUCE GUARINO and PETER ANTHONY FERRARA,

Petitioners,

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

Index No. 653520/2012
Motion Date: 3/8/13
Motion Seq. No.: 001

-against-

MARVIN ROTMAN,

Respondent.

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BRANSTEN, J.

Petitioners Rockwell Global Capital, LLC, Bruce Guarino and Peter Anthony Ferrara (collectively "Petitioners") move to vacate the award (the "Award") rendered by sole arbitrator Elizabeth Gilbert (the "Arbitrator") on September 7, 2012 in the FINRA arbitration *Marvin Rotman v. Rockwell Global Capital LLC, Bruce Guarino, and Peter Anthony Ferrara*, Case No. 11-04587 (the "Arbitration"). Respondent Marvin Rotman ("Respondent" or "Rotman") consents to this Court's vacating the Award.

I. Background

On December 8, 2011, Rotman initiated the underlying arbitration by filing a statement of claim (the "SOC") with FINRA. (Petition, ¶ 8.) The SOC asserted claims against Petitioners related to Rotman's $25,000 purchase of convertible notes from Simply Fit Holdings, Inc. ("Simply Fit") and Simply Fit's ensuing insolvency. *Id.*

Rotman sought damages in the "wherefore" clause in each SOC cause of action in an unspecified amount. (Petition, Ex. B ("SOC") ¶¶ 19, 24, 28, 32, 38.) Rotman claimed damages of "approximately" $25,000 in paragraph 16 of the SOC, but stated in a footnote that "[d]amages are stated for the purpose of the filing fee only and [c]laimants reserve their right to amend their damage figure at the final hearing." *Id.* at ¶ 16 n.1.

Upon submission of the SOC, FINRA classified the Arbitration as a simplified arbitration pursuant to FINRA Rule 12800. (Petition, ¶ 12.)

At that time, under FINRA Rule 12800, arbitrations involving $25,000 or less (exclusive of interest and expenses)[1] would be subject to a simplified arbitration procedure, overseen by a single arbitrator and without a hearing, except by request of customer. (Petition, ¶ 10; *see* FINRA Rule 12800.)

FINRA Rule 12800 further provides that "if any pleading increases the amount in dispute to be more than $25,000, the arbitration will no longer be administered under this rule, and the regular provisions of the [FINRA] [c]ode will apply. (FINRA Rule 12800.)

On February 27, 2012, Petitioners filed their Answer and Counterclaim. *See* Petition, Ex. C ("Counterclaim"). Petitioners' Counterclaim sought damages for indemnification for all costs and fees, including attorneys' fees, incurred in the defense of the Arbitration. The Counterclaim states that "[f]or the purposes of the filing fee, [Petitioners] estimate that their

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[1] Rule 12800 was amended, effective July 23, 2012 to raise this $25,000 threshold to $50,000. This amendment has no bearing on the issues herein because the Petitioners asserted counterclaims in the amount of $100,000 and therefore met either threshold.

costs will be $100,000 but will prove the exact amount at the arbitration hearing." (Counterclaim, p. 12.)

Petitioners maintain that because the Counterclaim was a "pleading [that] increase[d] the amount in dispute" to an amount over $25,000, FINRA should have ceased administering the Arbitration pursuant to Rule 12800 and should have followed the regular provisions of FINRA code, which provide for, *inter alia*, discovery, presentation of evidence and a hearing. (Petition, ¶ 19.)

The parties proceeded to engage in discovery as though they were headed toward a hearing. *Id.* at ¶¶ 25-27.

On July 20, 2012, Petitioners called FINRA to inquire as to the status of the selection of the panel of arbitrators, and for the first time, FINRA informed Petitioner's counsel that, although Petitioners had requested $100,000 in damages in the Counterclaim, the "wherefore" clause of the Counterclaim did not provide this amount, and therefore the damages were considered unspecified. *Id.* at ¶ 28. FINRA explained that the matter would remain a simplified arbitration unless Petitioners were granted leave to amend their pleading by the Arbitrator to reflect the damages in the "wherefore" clause. *Id.* at ¶ 29.

Contrary to the FINRA staff member's representation, FINRA Rule 12800 does not specify that a dollar amount exceeding $25,000 must be particularized in the "wherefore" clause of a claim. *See* FINRA Rule 12800. In addition, pursuant to FINRA Rule 12401, if the amount of a claim is unspecified, the panel will consist of three arbitrators, unless the parties agree in writing to one. *See* FINRA Rule 12401.

On July 26, 2012, as per FINRA's directive, Petitioners filed a motion for leave to amend the pleadings in order to assert the $100,000 damage amount in the "wherefore" clause of their Counterclaim.

On August 30, 2012, FINRA transmitted to the parties a copy of the Arbitrator's Order which denied Petitioners motion to amend the pleading without explanation. *See* Petition, Ex. N.

Shortly thereafter, on September 7, 2012, Petitioners filed a motion to the Director of FINRA Dispute Resolution to intervene and remove the arbitrator based on the disregard of FINRA rules by FINRA staff and the Arbitrator. On that same day, a FINRA staff member sent Petitioners a fax enclosing the Arbitrator's award deciding the matter, which resulted in a joint and several award of $25,000 against all the Petitioners and a denial of the Counterclaim. *See id.* at Ex. A. The Award did not include the Arbitrator's reasoning.

On October 18, 2012, Petitioners filed the Petition to Vacate Arbitration Award. On January 18, 2013, the parties e-filed a stipulation to vacate the Award, thus the petition is unopposed. Nevertheless, because arbitration awards are afforded such high deference by the court, the Court herein analyzes whether or not Petitioners have met this high burden of showing that the Award should be vacated, notwithstanding the parties' stipulation.

II. Standard of Law

Petitioners argue that the Award should be vacated pursuant to CPLR § 7511(b)(1) and, because the subject matter of the arbitration affects interstate commerce, the Federal Arbitration Act.

The federal and New York standards are equally deferential to the arbitrator's finding. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 n.7 (2008) (stating that the FAA is modeled after New York's arbitration statute); *see also In re Johnson*, 22 Misc. 3d 631, 646, n. 17 (Sup. Ct., N.Y. Cty. 2008) (stating that the court's resolution of the issue would be the same under either the FAA standard or the New York state standard). As a result, the court analyzes the instant petition under CPLR § 7511(b)(1).

Pursuant to CPLR § 7511(b)(1), a court may only vacate an arbitration award if the court finds that the rights of the party were prejudiced by (1) corruption, fraud or misconduct in procuring the award; (2) partiality of the arbitrator; or (3) where the arbitrator exceeded her power or so imperfectly executed it that a final and definite award was not made. CPLR CPLR § 7511(b)(1).

III. Analysis

Petitioners argue that the Award should be vacated because the Arbitrator and FINRA staff exceeded their power by disregarding FINRA rules and failing to remove the Arbitration from FINRA's simplified arbitration procedure. The court agrees.

FINRA Rule 12800 provides that, "if any pleading increases the amount in dispute to be more than $25,000, the arbitration will no longer be administered under this rule, and the regular provisions of the [FINRA] [c]ode will apply." (FINRA Rule 12800.) Although Petitioners' counterclaims did just that, the Arbitrator and FINRA staff members did not

reclassify the arbitration as one pursuant to the regular provisions of FINRA, and therefore exceeded their authority by failing to administer this Arbitration pursuant to FINRA's own rules and procedure.

There is no requirement in FINRA Rule 12800 that the amount of a claim must be located within the "wherefore" clause of a pleading in order for the rule to apply.[2] Had the Arbitrator reclassified the Arbitration, as FINRA rules require, Petitioners would have been afforded the opportunity to conduct discovery, present evidence and have a hearing, rather than have the merits of their claims decided unexpectedly on the pleadings alone.

Although this court would not set aside an award for *de minimis* infractions of FINRA rules, the Arbitrator's disregard of the fundamental right to be heard as recognized by FINRA's own rules leads this court to conclude that vacatur is warranted. *See Application of Inyx, Inc. v. Ulrich Bartke*, 2008 WL 8675212 (Sup. Ct., N.Y. Cty. 2008).

Although the parties consent to this Court ordering that FINRA not assign any further related arbitration proceedings to the Arbitrator, Elizabeth Gilbert, this Court does not find the authority to do so. Accordingly, that portion of the Petition is denied as selection of a FINRA arbitrator is best left to FINRA's discretion.

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[2] Under FINRA's own interpretation of its rules, it should have never classified this action as a simplified arbitration in the first place. Rotman did not include the $25,000 amount in the SOC's "wherefore" clause, and claims for unspecified amounts are to be heard by a panel of three arbitrators. FINRA Rule 12401.

Order

Accordingly, it is hereby

ORDERED that the petition to vacate the arbitration award is granted and the arbitration award rendered on September 7, 2012 by arbitrator Elizabeth Gilbert in *Marvin Rotman v. Rockwell Global Capital LLC, Bruce Guarino, and Peter Anthony Ferrara*, Case No. 11-04587 is hereby vacated; and it is further

ORDERED that each party shall bear his or its own costs and disbursements.

This constitutes the decision and order of the court and judgment may be entered hereon accordingly.

Dated: New York, New York
March 15, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.