

Matter of Besman v Roberts

2013 NY Slip Op 32300(U)

April 26, 2013

Supreme Court, New York County

Docket Number: 654476/2012

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.

PART _____

Index Number : 654476/2012
BESMAN, PASCAL
vs
ROBERTS M.D., BRIGETTE
Sequence Number : 001
VACATE AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

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

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 the annexed decision.

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

Dated: 4/26/13

PK
CYNTHIA S. KERN, J.S.C.
J.S.C.

- 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: Part 55

-----x
In the Matter of the Application of

PASCAL BESMAN,

Petitioner,

Index No. 654476/2012

-against-

DECISION/ORDER

BRIGETTE ROBERTS, M.D. and FINANCIAL
INDUSTRY REGULATORY AUTHORITY,

Respondents.

-----x
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Pascal Besman (hereinafter “petitioner” or “Besman”) commenced the instant proceeding seeking an Order pursuant to CPLR § 7511 vacating and setting aside the October 42, 2012 arbitration award issued by respondent Financial Industry Regulatory Authority (“FINRA”) in favor of respondent Brigitte Roberts, M.D. (“Dr. Roberts”) on the ground that it does not constitute “a final and definite award upon the subject matter submitted.” Respondent Dr. Roberts’ cross-moves for an Order pursuant to CPLR § 7510 confirming the arbitration award and directing that judgment be entered thereon. For the reasons set forth more fully below, the petition is denied and respondent’s cross-petition is granted.

The relevant facts are as follows. In 2006 petitioner was an employee of ThinkEquity Partners, LLC (“ThinkEquity”). On or about May 29, 2006, Dr. Roberts opened an investment account in her name with ThinkEquity, which petitioner was to administer as Dr. Roberts’ registered securities broker. On or about March 2, 2010, Dr. Roberts commenced an arbitration proceeding with the Financial Industry Regulatory Authority (“FINRA”) against petitioner and ThinkEquity to recover damages allegedly caused by petitioner and ThinkEquity’s purchase of high-risk preferred auction-rate securities for Dr. Roberts’ account.

At the conclusion of a six day arbitration proceeding, the FINRA arbitration panel issued an Award in favor of Dr. Roberts. Specifically, FINRA found petitioner and ThinkEquity jointly and severally liable to Dr. Roberts in the amount of \$1,475,000.00, and directed petitioner and Think Equity to “rescind purchases of auction-rate securities outstanding in [Dr. Roberts’] account” (the “Award”).

Petitioner now seeks to vacate the Award on the ground that it does not constitute “a final and definite award upon the subject matter submitted” to the arbitration panel. Specifically, petitioner argues that the Award is deficient because it creates uncertainty in two ways: (1) by requiring the payment of 1.475 million and also requiring the rescission of the auction-rate securities, it is not clear as to what effect these actions will have upon the amount that petitioner is obligated to pay Dr. Roberts; and (2) the award does not make clear whether ThinkEquity was allowed to sell (as opposed to “rescind”) the auction-rate securities to mitigate the Award. Moreover, petitioner argues that the Award has now created a “three-way stand off” as it precludes ThinkEquity and petitioner from selling the securities and yet makes it impossible to rescind them. Dr. Roberts argues that on its face the Award fully and finally resolves every issue

and petitioner's arguments to the contrary are simply nonsensical and entirely unsupported by the facts and the law.

It is well settled that the determinations of an arbitration panel are not to be lightly set aside and "judicial review of an arbitration proceeding is extremely limited." *Frankel v. Sardis*, 76 A.D.3d 136, 139 (1st Dept 2010). Indeed, "[e]ven in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice." *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 (1999). Thus, pursuant to CPLR § 7510, "[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." CPLR § 7511(b)(1) provides, in relevant part, that: "The Award shall be vacated on the application of a party . . . if the court finds that the rights of that party were prejudiced by: (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." "To be final and definite, it is necessary only that the award resolve the dispute submitted in a matter that does not remit the parties to a new controversy or future litigation, and that unequivocally indicates their respective rights and obligations and what each must do." *In re Guetta (Raxon Fabrics Corp.)*, 123 A.D.2d 40, 44 (1st Dept 1987); *see also Meisels v. Uhr*, 79 N.Y. 2d 526 (1992). Additionally, an award is not regarded as "lacking in definiteness or completeness merely because some future event might render performance impossible." *In re States Mar. Lines, Inc. (Crooks)*, 13 N.Y.2d 206 (1963).

In the instant action, the petition to vacate the October 24, 2012 arbitration award is

denied as the Award fully resolved the dispute submitted to FINRA, did not create a new controversy and unequivocally indicated each party's rights and obligations. The dispute at issue in the arbitration was whether petitioner and ThinkEquity were liable to Dr. Roberts' for purchasing high-risk preferred auction rate securities for her account. This issue was fully resolved when FINRA found petitioner jointly and severally liable and directed them to pay Dr. Roberts 1.475 million dollars and rescind purchases of auction rate securities outstanding in Dr. Roberts' account.

Petitioner's contention that the award does not make clear his liability to Dr. Roberts is without merit. By finding ThinkEquity and petitioner "jointly and severally" liable, the Award unequivocally establishes that petitioner is liable to Dr. Roberts for the entire \$1.475 million. Additionally, petitioner's contention that the Award does not make clear whether ThinkEquity is allowed to sell (as opposed to "rescind") the auction-rate securities to mitigate the Award is also without merit. The award explicitly directs ThinkEquity and petitioner to "rescind" the securities upon payment of the 1.475 million dollars to petitioner representing the amount she paid for the outstanding securities. Whether petitioner feels that he should be able to sell the securities in order to mitigate the monetary award is irrelevant as that is not what FINRA directed in the Award and it is not for this court "assume the role of overseers to conform the award to their sense of justice." *Matter of New York State Correctional Officers*, 94 N.Y.2d at 326. Similarly, even assuming, *arguendo*, that petitioner's contention that the Award has now created a "three-way stand off" as no one can sell the securities is true, it is wholly irrelevant as an award is not regarded as "lacking in definiteness or completeness merely because some future event might render performance impossible." *In re States Mar. Lines*, 13 N.Y.2d at 206. The remainder of

