

Straus v Merkin

2014 NY Slip Op 30730(U)

March 24, 2014

Sup Ct, New York County

Docket Number: 652910/11

Judge: Richard B. Lowe III

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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MOSHAEL J. STRAUS,

Petitioner,

Index No.
652910/11

-against-

Motion Sequence No.
001 and 002

J. EZRA MERKIN,

Respondent.

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RICHARD B. LOWE, III, J.:

In this motion, petitioner seeks to confirm an October 2011 arbitration award of \$7,010,463.50 (including interest through October 31, 2011), plus post-award interest. Respondent cross-moves to vacate portions of the same arbitration award. In motion sequence 002, petitioner seeks to dismiss the counterclaim for indemnification.

Background

It is uncontested that petitioner invested \$5,081,222 in Ascot Partners, L.P. (Ascot), an investment that was wholly invested through Bernard L. Madoff (Madoff). When it was revealed in December 2008 that Madoff was running a Ponzi scheme, it became known to petitioner that most, if not all his investment was lost. On July 22, 2010, petitioner, a New Jersey resident, commenced an arbitration against respondent under the New Jersey Securities Act, alleging violations of such Act, and

asserting common-law fraud, breach of fiduciary duty, breach of contract, gross negligence, negligence and negligent misrepresentation claims.

The arbitration, entitled *In the Matter of Arbitration Between Moshael Straus, Claimant, and J. Ezra Merkin, Respondent* (AAA Case No. 13 148 Y 001800-10), was heard in June and July of 2011. As the result of the testimony given during the hearing, as well as the motion practice that preceded it, the arbitration panel issued a full decision and award (the Arbitration Award). Petitioner was awarded \$5,081,222.00 (the amount of petitioner's investment in Ascot), plus interest of \$1,929,241.50, plus additional interest after September 1, 2011 at the rate of .05% (\$70.428) per day until December 31, 2011, "and thereafter at the rate set for prejudgment interest by the New Jersey Supreme Court."

The Arbitration Award contained a dissenting opinion, and it is mostly upon that dissenting decision that respondent has based his cross motion to vacate. Respondent contends that the majority of arbitrators (1) disregarded the decision by Judge Batts in *In re Merkin*, 817 F Supp 2d 346 (US Dist Ct, SDNY 2011) that was dispositive of this matter; (2) disregarded the law by finding that petitioner did not know about Madoff's role in Ascot; and (3) disregarded the fact that petitioner's claims were barred by the Statute of Limitations. Additionally, respondent

contends that, under the express terms of the Subscription Agreement that petitioner signed, respondent is entitled to indemnification for all losses, including attorney's fees, expenses and costs resolved in favor of respondent.

Discussion

Arbitration awards in New York are subject to very limited review. *Tullett Prebon Fin. Servs. v BGC Fin., LP*, 111 AD 3d 480 (1st Dept 2013). To achieve the goals of efficient settlement of disputes and the avoidance of long and expensive litigation, courts are loath to deny confirmation of an arbitration award. *Folkways Music Publishers, Inc v Weiss*, 989 F 2d 108 (2d Cir 1993).

It is only when arbitrators exceed their powers and "manifestly disregard" the law that an arbitration award should be vacated. *Id.* "Specifically, a court may not vacate an arbitration award unless it finds 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.'" *McDaniel v Bear Stearns & Co., Inc.* 196 F Supp 2d 343, 351 (US Dist Ct, SDNY 2002) (quoting *Greenberg v Bear, Stearns & Co.*, 220 F 3d 22, 28 [2d Cir 2000]).

Respondent opines that the Arbitration Award should be vacated because he made the arbitrators aware of Judge Batts's

decision in *In re Merkin* in September 2011, ie, prior to the publication of their Arbitration Award, and the arbitrators refused to follow it. However, the arbitrators specifically comment in detail upon the Batts' decision in the Arbitration Award. Further, the arbitrators extensively review the New Jersey applicable law, including Statute of Limitations issues.

As respects the credibility of the witnesses that appeared before them, it was the arbitrators' charge to determine which of the witnesses they believed. As such, the majority maintains that they "have found that Claimant has proven his case, not just by clear and convincing evidence, but overwhelming evidence." See Arbitration Award, at 18.

The totality of the statements within the Arbitration Award are sufficient to hold that the arbitrators did not "manifestly disregard" the law, and therefore, the Arbitration Award is confirmed.

Further, because the arbitration was not resolved in favor of respondent, he is not entitled to indemnification under the terms of the Subscription Agreement.

Conclusion

Therefore, based on the foregoing, it is hereby


ORDERED, that the motion to confirm the award is granted and the cross motion to vacate portions of the same arbitration award is denied and it is further hereby

ORDERED that with respect to motion sequence 002, the motion to dismiss the counterclaim for indemnification is granted.

This shall constitute the Order and Decision of the Court.

Dated: March 24, 2014

ENTER:



HON. RICHARD P. LOWE III
J S C